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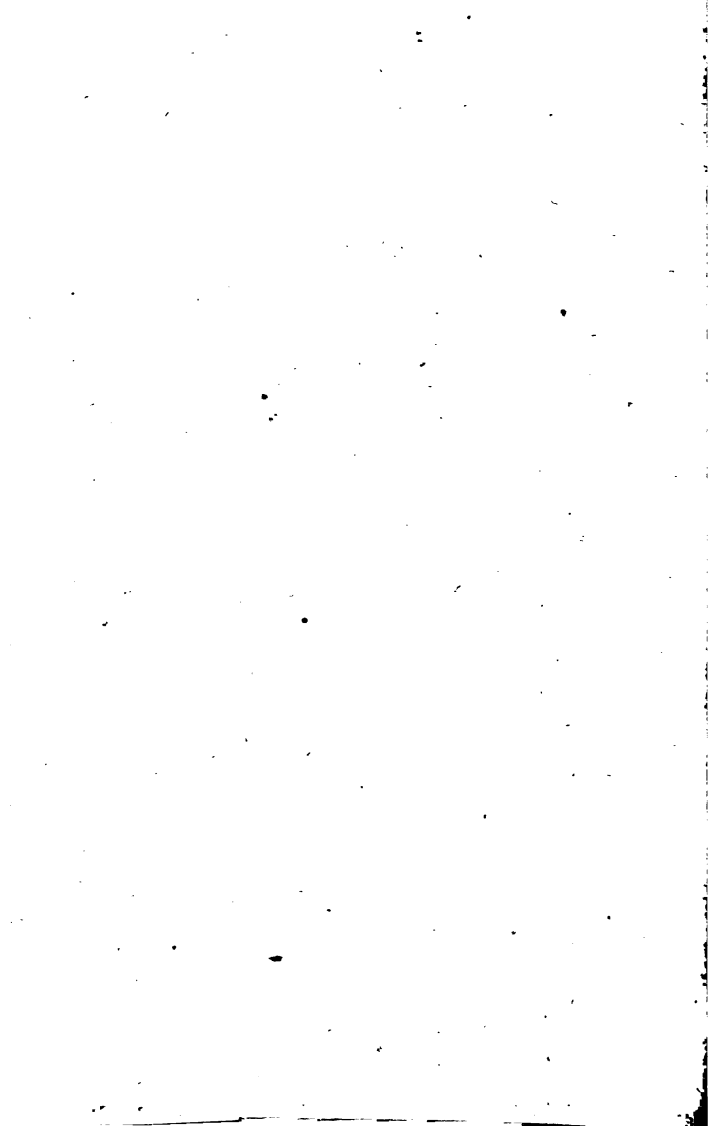
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HAS



A
TREATISE
ON THE
LAW
OF
BILLS OF EXCHANGE
AND
PROMISSORY NOTES.

BY
JAMES KYD, OF THE MIDDLE TEMPLE,
BARRISTER AT LAW.

THE SECOND AMERICAN,
THE THIRD LONDON, EDITION,
WITH A CONSIDERABLE ADDITION.

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TO THE
PRESENT EDITION.

WHEN the first edition of the following Treatise was published, several points of importance remained doubtful; most, if not all, of these have been decided in cases which have since occurred; the alterations rendered necessary by these decisions have been made in the present edition, and the author is not aware that any thing material has been omitted which might be found useful in such a work.

*No. 4, Hare Court, Temple,
Trinity Term, 1795.*

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TO THE
FIRST EDITION.

TWO Treatises are already before the public on the subject of the following sheets: Without attempting to appreciate the respective merits of these performances, or to compare them particularly with his own, the author of the present publication feels it necessary to observe, that the plan of his work differs very materially from either of the others. He has endeavoured to produce a composition, which, without disgusting the professional reader, may be easily comprehended by men of business, and serve as an elementary treatise to the student. In executing this plan, he has given, under each division, an historical deduction of the opinions which have been held on the point immediately under discussion, and concluded with the law as settled by the latest decisions, where, in fact, it has been settled. Where the point remains still in doubt, he has stated the arguments on both sides of the question. How far he has succeeded in the execution, the public only can decide.

*No. 4, Hare Court, Temple,
October, 1790.*

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T R E A T I S E
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B I L L S o f E X C H A N G E, a n d P R O -
M I S S O R Y N O T E S.

C H A P. I.

Of the Origin and Nature of BILLS OF EX-
CHANGE, *and* PROMISSORY NOTES.

IN the infancy of mankind, nature pointed out the simple mode of exchanging one commodity for another, by a comparative estimation of their respective values, dictated by the immediate wants of the parties to the exchange. But when the occupation of a merchant became a distinct profession, prospects of a more distant gain introduced a more exact appreciation of the value of the several articles; and a common standard, under the denomination of money, to which every thing else should be referred as its measure, appears to have been adopted at a very early period in the history of mankind. It is *Genesis.* probable, from the low state of navigation and
B commerce

commerce in the ancient world, that the only improvement, till long after the subversion of the Roman empire, was the reduction of the rude pieces of antiquity to a more commodious form, under the sanction of the state. It was reserved for an oppressed people, considered as the outcasts of mankind, in an unenlightened age, urged by the necessity of their situation, to introduce into Europe at least, if not to give birth to, a method, by which the merchants, of regions the most remote from each other, could convey the means of procuring the value of their commodities, without the inconveniency of transporting gold or silver. About the middle, or towards the end of the thirteenth century, the Jews, driven by the exactions of the Prince, from England and France, took refuge in Lombardy, and from thence gave to merchant strangers and travellers, secret letters on those to whom they had entrusted their effects in the former countries; who honourably discharged the trust reposed in them, by complying with the orders contained in the letters. In the course of time these letters received a fixed form, and had conferred on them the name of **BILLS OF EXCHANGE**.

It is by means of these bills of exchange, that money is now usually remitted from one country to another: The parties to them are generally four, two at the place where the bill is drawn, and two at the place of payment; as where A, a merchant at Amsterdam, owes money to B, a merchant in London, instead
of

Montesquieu, l. 21,
c. 16.

of sending the money in specie to B, he applies to C, another merchant at Amsterdam, to whom D, a fourth person, residing in London, is indebted to an equal amount; A pays to C the money in question, and receives from him a bill directed to D to pay the amount to B, or to any one appointed by him, who sends it to his correspondent B, with an order that the money be paid to him by D.

BUT it frequently happens, that only three persons are concerned, as where A, residing at Amsterdam, and wishing to remit money to B at London, for goods bought of him, and having C, a debtor also at London, addresses his bill to the latter, desiring him to pay the sum mentioned to B, or to his order, to whom he then sends it by letter.

OR if I be at Exeter, and intending to go to London, and wanting money, I may take it up of a friend at Exeter, and give him bills drawn on myself, payable to whomsoever he shall appoint in London.

THERE may also be only two parties concerned in the formation of a bill, as where the person making it desires another to pay to himself or to his order.

A BILL OF EXCHANGE therefore may be defined, to be an open letter of request, addressed by one person to a second, desiring him to pay a sum of money to a third, or to any other to whom that third person shall order it to be paid: or it may be payable to bearer.

THE person who makes the bill is called the

Beaves,
450.

1 Salk. 194
5 Mod. 29.
Per Holt.

Bill of Exchange,
what.

the *drawer*; he to whom it is addressed the *drawee*; and if he undertake to pay the amount, he is then called the *acceptor*. The person to whom it is ordered to be paid is called the *payee*, and if he appoint another to receive the money, that other is called the *indorsee*, as the payee is with respect to him the *indorser*; and any one who happens for the time to be in possession of the bill, is called the *holder* of it.

THE time at which the payment is limited to be made is various, according to the circumstances of the parties, and the distance of their respective residences. Sometimes the money is payable at *sight*, sometimes at so many days *after sight*; at other times, at a certain distance from the *date*. *Ufance* is the time of one, two, or three months after the date of the bill, according to the custom of the places between which the exchanges run. Double or treble *ufance*, is double or treble the usual time, and half *ufance* is half the time.

USANCE between London and any part of France, is thirty days after date.

BETWEEN London and the following places,—Hamburgh, Amsterdam, Rotterdam, Middleburg, Antwerp, Brabant, Zealand, and Flanders,—is one calendar month after the date of the bill.

BETWEEN London and Spain and Portugal, two calendar months.

BETWEEN London and Genoa, Leghorn, Milan, Venice, and Rome, three calendar months.

THE *ufance* of Amsterdam, on Italy, Spain and Portugal, is two months.

ON France, Flanders, Brabant, and on any place in Holland or Zealand, is one month.

ON Frankfort, Nuremberg, Vienna, and other places in Germany, on Hamburg and Breslau, fourteen days after sight, two usance twenty-eight days, and half usance seven.

HALF usance, when the usance is one month, shall contain fifteen days, notwithstanding the inequality in the length of the months.

WHERE the time, after the expiration of which a bill is made payable, is limited by months, it must be computed by calendar, not lunar months: Thus, on a bill dated the first of January, and payable at one month after date, the month expires on the first of February.

ON this account it is said in some books, that where the bill is dated the last day of a month, some difficulty may arise from the manner in which that last day is expressed, on account of the inequality in the length of the months: Thus in cases of bills payable one month after date, if the date be simply the last day, and the number of the day be not expressed, it is said the month expires the last day of the succeeding month; as if it bear date the *last* day of February, the time does not expire till the 31st of March; but if the *number* of the day be expressed, the month expires on the day corresponding in number to the date: as if the date be the 28th of February, the time expires on the 28th of March.—On the same principle it would

seem, where the date is the 31st of March, the time will not expire till the first of May, but where it is the *last* day of March, it expires the 30th of April.

BUT this difficulty can hardly ever occur in practice, as it is apprehended the instances of bills dated the *last* day of a month are very rare; and where one month is longer than the succeeding one, it is a rule not to go, in the computation, into a third: Thus, on a bill dated the 28th, 29th, 30th, or 31st of January, and payable one month after date, the time expires on the 28th of February in common years, and in the three latter cases, in leap year, on the 29th.

THE general rule of law is, that when computation is to be made from an act done, the day in *which* the act is done must be included; because the law, unless to prevent mischief or inconvenience, admitting no fraction of a day, the act relates to the first moment of the day, and is considered as done then. But when the computation is to be *from* the day itself, the natural construction of the words imports that the day must be excluded: thus where a lease is made to commence *from* the day of the date, the day is excluded, and it begins the next day, but if it be to commence from the *making*, the day is included.—With respect to bills of exchange, however, the case is different: The custom of merchants, which makes part of the law of the land, being, that where a bill is payable at so many days after sight, or from the date, the day of presentment

or

Clayton's
Case,
2 Vent.
308 310.

Bellasis v.
Hester.
Ld. Raym.
281.
Coleman.
v. Sayer.
Str. 829.

or of the date is excluded. Thus where a bill, payable ten days after sight, is presented on the first day of a month, the ten days expire on the eleventh; where it is dated the first, and payable twenty days after date, these expire on the twenty-first. Where there is no date, and the payment is directed to be made so many days *after* date, the date is taken to be the day on which it issued.

THE vernal equinox, as the year was rectified by Julius Cesar, happened to fall, in the year 325, on the 21st of March: But from causes which it is foreign to the purpose of this treatise to explain, in 1582, the equinox having changed from the 21st to the 11th of March, Pope Gregory XIII. ordered ten days to be taken out of the calendar, and the 11th day of March to be reckoned as the 21st. This edict was generally obeyed by the nations who acknowledged his authority, but most of the Protestant countries continued the former method of reckoning their time, and from hence arose the different modes of computation, which now obtain in Europe under the denominations of Old and New Style. Since the days of Gregory, the equinox has receded one day, so that there are eleven days of difference between the Old and New Style; or, in other words, the first day of any month according to the *old* style, is the twelfth according to the *new*.

OLD Style now prevails in Muscovy, Denmark, Holstein, Hamburg, Utrecht, Gueldres, East

NATURE, &c. OF BILLS OF EXCHANGE,

East Friesland, Geneva, and in all the Protestant principalities in Germany, and the Cantons of Switzerland.

NEW Style, in all the dominions subject to the Crown of Great Britain, in Amsterdam, Rotterdam, Leyden, Haerlem, Middleburg, Ghent, Brussels, Brabant, and in all the Netherlands, except Utrecht and Gueldres; and in France, Spain, Portugal, Italy, Hungary, Poland, and in all the Popish principalities of Germany, and the Cantons of Switzerland.

WHERE a bill, payable at a certain time from the date, is drawn at a place using one style, and remitted to a place using the other, the time is to be computed according to the style of the place at which it is drawn.—Thus, on a bill payable the 1st of March, old style, and payable here one month after date, the month is to be reckoned from the twelfth of March, because that day, according to the new style, corresponds to the first according to the old.*

SOMETIMES the drawer of a bill makes the date both according to the old and new style, writing the one above and the other below a small line drawn between them, thus :

18	•	March 28
—	•	—
29	•	April 8

WHERE

* Beawes, in his *Lex Mercatoria*, page 484, sect. 251, says, that a bill payable on a certain day, is due on the day mentioned, according to the style of the place at which it is drawn, which seems contrary to the reason and nature of the thing.

WHERE a bill is payable at a time after sight, there can be no difficulty; the time must evidently be computed according to the style of the place where it is payable.

A CUSTOM has obtained among merchants, ^{Days of} that a person to whom a bill is addressed, shall ^{Grace} be allowed a little time for payment, beyond the term mentioned in the bill, called days of grace. But the number of these days varies, according to the custom of different places.

GREAT BRITAIN, Ireland, Bergamo, and Vienna, three days.

FRANKFORT, out of the time of the fair, four days.

LEIPSICK, Naumburg, and Augsburg, five days.

VENICE; Amsterdam, Rotterdam, Middleburg, Antwerp, Cologne, Breslau, Nuremberg, and Portugal, six days.

DANTZICK, Koningsberg, and France, ten days.

HAMBURG and Stockholm, twelve days.

NAPLES eight, Spain fourteen, Rome fifteen, and Genoa thirty days.

LEGHORN, Milan, and some other places in Italy, no fixed number.

SUNDAYS and holy days are included in the respite days at London, Naples, Amsterdam, Rotterdam, Antwerp, Middleburg, Dantzick, Koningsberg, and France, but not at Venice, Cologne, Breslau, and Nuremberg. At Hamburg, the day on which the bill falls due makes one of the days of grace, but it is not so elsewhere.

IN

IN England, if the last of the three days happens to be Sunday, the bill is to be paid on Saturday.

BUT bills payable at sight, are to be paid without any days of grace

Form of
Bills of Ex-
change,
Beawes,
434.

THE style admits of several variations, according as one or more bills are granted for the same sum ; or according to the *time* of payment, or the *place* of payment, (though the latter be seldom mentioned) as, at his own house—at the house of A. B. &c. or according to the specie in which payment is to be made, as in English money, French money, &c. or according to the different kinds of value received for them; for though bills in Britain bear only *value received*, in general, yet bills drawn in other countries usually particularize whether the value was given in money, goods, or bills, or according to the number of persons concerned in the bill ; for bills may be drawn by and upon, and payable to, not only single persons, but also persons in company or co-partnership ; or according as the person on whom it is drawn is to expect further direction or not from the drawer, and so run thus : *as per advice from your humble servant ;* or thus : *as per advice from A. B.* or, *without further advice.*

BILLS of Exchange are distinguished by the appellation of *foreign* and *inland* bills ; the first being those which pass from one country to another, and the latter such as pass between parties residing in the same country. The universal consent of merchants had established a system of customs relative to *foreign* bills,

bills, which was adopted as part of the law in every commercial state.

THOUGH the object of Bills of Exchange was at first to be the medium of remittance between *different countries*, yet in Italy, Germany, and France, where the trading cities, though included within the limits of an extended government, were in effect under the distinct jurisdiction of sovereigns independent of one another, the merchants of different cities of the same country very soon adopted them in their mutual transactions, and they were in every respect considered in the same light in the one case as in the other. But in this country, which was united under one firm government, where in the infancy of commerce, the transactions of one trading town with another were of but little importance; and where, from the better regulated police and easier communication between the different parts of the kingdom, gold and silver could be conveyed with greater safety; it appears that this mode of negotiation was introduced at a very late period; for Lord Chief Justice Holt is reported to have said, that he remembered *when* actions on inland bills of exchange first began, so that inland bills themselves cannot be supposed to have been very frequent before the reign of Charles II. And when they *were* introduced, they were not regarded with the same favour as *foreign* bills, differing in some circumstances, of which notice will be taken in a subsequent part of this treatise. At length, however, the legislature,

sensible

Mich.

2 Anne.

6 Mod. 29.

9 & 10 W.
III. c. 17.
3 & 4 An.
c. 9.

sensible of the advantage arising to trade from this mode of payment, by two different statutes, set them on nearly the same footing with foreign ones ; so that what was the law and custom of merchants with respect to the one, is now, in most respects, the established law of the country with respect to the other.

THERE is, however, one circumstance in which they differ with respect to practice : Inland bills are generally single, there being only one of the same tenor and date, whereas foreign bills are usually in sets, consisting of three bills of the same tenor and date, a method adopted by way of precaution to guard against the risk of miscarriage.

Lex Mercatoria,
451.

THE following precautions are recommended by Beawes, in the drawing of a Bill of Exchange : 1st, That it have its date rightly and clearly expressed. 2dly, That it have the name of the place where it was made. 3dly, That the sum be expressed so distinctly, both in words and figures, that no exceptions can be taken against it. 4thly, That the payment be ordered and commanded. 5thly, That the time of payment be not dubiously expressed, nor sooner nor later than has been agreed on. 6thly, The person remitting the bill must particularly observe, that the name of the person to whom payment is to be made, be properly spelled ; or if it be made to his order, that those words be clearly written. 7thly and 8thly, He must observe whether his own name be there, and the value

of

of him be expressed. 9thly, He must observe that the bill be subscribed by the drawer.— 10thly, The drawer must principally look to the direction of the bill, that it be true, and directed to the right person. 11thly, They must both observe, that the place where the payment is to be made (and the coin or specie in which the bill is to be paid) be fully expressed in the superscription or body of the bill; and if the drawer draw upon one not living at the place where the bill is intended to be paid, then the remitter must observe, that as well the place where the person lives that is to pay, as the place where payment is to be made, be expressed.

The following are EXAMPLES of the different kinds of BILLS.

No. I.

London, January 18th, 1782.

Exchange for £. 50 Sterl.

AT sight (* of this my only Bill of Exchange) pay to Mr. John Rogers, or order, Fifty Pounds sterling, value received of him, and place the same to account, as per advice (or without further advice) from

SAMUEL SKINNER.

*To Mr. James Jenkins,
Merchant, in Bristol.*

C

No.

* This is not always inserted.

No. II. (1.)

London, the 18th of January, 1782.

Exchange for 10,000 Liv. Tournoises.

AT fifteen days after date (or at one, two, &c. usances) pay this my first Bill of Exchange, (second and third of the same tenor and date not paid) to Messrs. John Rogers and Co. or order, Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from

THOMAS BENCRAFT.

*To Mr. Henry Kendrick,
Banker, in Paris.*

No. II. (2.)

London, Jun. 18th, 1782.

Exchange for 10,000 Liv. Tournoises.

AT fifteen days after date (or at one, two, &c. usances) pay this my second Bill of Exchange (the first and third of the same tenor and date not paid) to Messrs. John Rogers and Co. or order, Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from

THOMAS BENCRAFT.

*To Mr. Henry Kendrick,
Banker, in Paris.*

No.

No. II. (3.)

*London, Jan. 18, 1782.**Exchange for 10,000 Liv. Tournoises.*

AT fifteen days after date (or at one, two, &c. usances) pay this my third Bill of Exchange, (the first and second of the same tenor and date not paid) to Messrs. John Rogers and Co. or order, Ten Thousand Livres Tournoises, value received of them, and place the same to account, as per advice from

THOMAS BENCRAFT.

*To Mr. Henry Kendrick,
Banker, in Paris.*

No. III.

*London, January 18th, 1782.**Exchange for D. 1000.*

AT usance pay this my first of Exchange to Mr. Ignatio Testori, (or to the *procuration* of Mr. Ignatio Testori) One Thousand Ducats Banco, value received of Mr. Gregory Laman, and place it to account, as per advice from

NICHOLAS REUBENS.

*To Mr. James Robottom,
Merchant, in Venice,*

No.

No. IV.

*London, January 18th, 1782.**Exchange for 1600 per 100 R's.*

AT thirty days sight, (or ulance, &c.) pay this my first of Exchange, (second and third as above) to Samuel Fairfax, Esquire, or order, One Thousand Six Hundred Mil-Reas, value received of ditto, and place it to account, as per advice from.

JEREMIAH TOMLINSON.

*To Messrs. Brown and Black,
Merchants, at Lisbon.*

No. V.

London, January 18th, 1782.

*Exchange for £. 273. 15s. sterl. at 35 Sc.
7 G. per £. sterling.*

AT two ufo's and a half, pay this my first of Exchange, (second, &c.): to Mr. Joseph Jacobs, or order, Two Hundred and Seventy-Three Pounds Fifteen Shillings sterl. at thirty-five shilling and seven groots per pound sterling, value received of Mr. James Merryman, and place it to account, as per advice from

JOHN JOHNSON.

*To Mr. David Hill,
Merchant at Amsterdam.*

No.

No. VI.

No. 4. *London, 22d September, 1789.*

For £. 200 Sterl. at 35 Sh. Flemish.

Two months after date of this my first of Exchange, (second, &c.) pay to D. E. or order, at his own house, Two hundred pounds sterl. at thirty-five shillings Flemish per pound sterling, value received of him, and pass the same to account, as per advice from

Your's, &c.

A. B.

To Mr. Peter Par,
Merchant, at Amsterdam.

No. VII.

* No. 10. *London, Sept. 22, 1765. £. 200.*

PAY to me, A. B. grocer, in London, or order, on the first day of November next, the sum of Two Hundred Pounds in goods of

Your humble servant,

A. B.

To G. H. Vintner,
In Westminster.

Accepts G. H.

As

* It is usual when the drawer draws a bill or draft on a banker, or on a person on whom he usually draws, to number the bill in this manner.

C 2.

Origin of
Promissory
Notes.

As commerce advanced in its progress, the multiplicity of its concerns required, in many instances, a less complicated mode of payment than by Bills of Exchange. A trader, whose situation and circumstances rendered credit from the merchant or manufacturer who supplied him with goods, absolutely necessary, might have so limited a connection with the commercial world at large, that he could not easily furnish his creditor with a Bill of Exchange on another man; but his own responsibility might be such, that his simple promise of payment, reduced to writing for the purpose of evidence, might be accepted with equal confidence as a bill on another trader: Hence, it may reasonably be conjectured, Promissory Notes were at first introduced; and the period of their introduction appears to have been about 30 years before the reign of Queen Anne.

6 Mod.
30.
2 Anne.

Vid. 1 Salk.
129. 2 Lord
Raym.
757, 759,
and pream-
ble to 3 &
4 Ann. c. 9.

A PROMISSORY Note may be defined to be an engagement in writing to pay a certain sum of money mentioned in it, to a person named, or to his order, or to the bearer at large; and at first these notes were considered only as written evidence of a debt; for it was held that a Promissory Note was not assignable or indorsible over, within the custom of merchants, to any other person, by him to whom it was made payable; and that if, in *fact*, such a note had been indorsed or assigned over, the person to whom it was so indorsed or assigned, could not maintain an action, within the custom, against the person who first drew and subscribed the note; and that
within

within the same custom even the person to
 whom it was made payable could not main-
 tain such action. But at length they were
 recognized by the legislature, and put on the
 same footing with inland Bills of Exchange,
 by a statute which enacts, "That from the
 "first of May, 1705, all notes in writing
 "made and signed by any person or persons,
 "body politic or corporate, or by the servant
 "or agent of any corporation, banker, gold-
 "smith, merchant, or trader, usually intrusted
 "by him, her or them, to sign such Promissory
 "Notes by him, her or them, whereby such
 "person or persons, body politic or corpo-
 "ate, his, her or their servant or agent as a-
 "foresaid, doth or shall promise to pay, to
 "any other person or persons, body politic
 "and corporate, his, her or their order, or
 "to bearer, any sum of money mentioned
 "in such note, shall be taken and constru-
 "ed to be, by virtue thereof, due and paya-
 "ble to any such person or persons, body
 "politic and corporate, to whom the same
 "is made payable; and also every such note
 "shall be assignable or indorsible over in
 "the same manner as Inland Bills of Ex-
 "change; and that the person, &c. to whom
 "such sum is by such note made payable, may
 "maintain an action for the same, in the same
 "manner as they might do on an Inland Bill
 "of Exchange, made or drawn according to
 "the custom of merchants, against the person
 "or persons, body politic and corporate, who
 "or whose agent signed the same; and that
 "any

3 & 4 Ann.
 c. 9. made
 perpetual
 by 7 Ann.
 c. 25. s. 2.

“any person, &c. to whom such note is indorsed or assigned, or the money therein mentioned, ordered to be paid by indorsement thereon, may maintain an action for such sum of money, either against the person, &c. who or whose agent signed such note, or against any of the persons who indorsed the same, in like manner as in cases of Inland Bills of Exchange.”

PROMISSORY NOTES are in these forms,

£. 10.

London, December 15, 1789.

I PROMISE to pay G. F. or bearer, on demand, Ten Pounds, for value received.

S. R.

£. 30. 12. 6.

London, January 1, 1790:

Two months after date, we or either of us promise to pay to Mr. C. B. and Co. or order, Thirty Pounds Twelve Shillings and Sixpence, value received.

D E.
G. K.

Vid. 23
Geo. 3. c.
49.

TILL the twenty-third of George III. these notes and bills were written on a plain piece of paper unstamped: By a statute made in that year, certain duties were imposed on every piece of vellum, parchment or paper, on which Bills and Notes, falling under certain descriptions, should be written, engrossed, or printed.

printed. By a subsequent Act these duties ^{31 G. 3.} are taken off, and others imposed in their ^{c. 25. s. 2.} stead.

By this latter statute, the duties on Inland Bills and Notes vary according to the different classes into which they are distributed, by the provisions of the same statute.

ONE distinction is marked between those in which the sum expressed does *not* exceed £. 200, and those in which it *exceeds* that sum.

OF those in which the sum does *not* exceed £. 200 there are two general divisions; those payable on *demand*, and those payable *otherwise* than on demand.

OF those payable on *demand* a distinction is made between Bills of Exchange, Drafts or Orders, for the payment of money on *demand*, and *Promissory* Notes, or *other* Notes for the payment of money to the *bearer* on *demand*.

THE latter kind may be re-issued without ^{vid. s. 7. &c.} being subject to the duty a second time; and ^{9.} the holder has the same remedy for the recovery of the sum expressed in them, after their being re-issued, as he would have had at first. But of these there are two classes—those which may be re-issued from time to time, after payment at the place *where they were first issued*; and those which may be re-issued from time to time, after payment *at the same place, or any other place*, than where they were first issued. The first may be for sums not exceeding £. 200, the second for sums not exceeding £. 30.

Duties.

Vid. f. 2.

Duties on Bills of Exchange, Drafts or Orders, for the payment of Money on demand.

	s.	d.
For any sum amounting to 40s. not exceeding 5 Guineas	0	3
— exceeding 5 Guineas, — £. 30	0	6
— exceeding £. 30 — 50	0	9
— exceeding 50 — 100	1	0
— exceeding 100 — 200	1	6
For any sum from 200 upwards	2	0

Duties on Bills of Exchange, Drafts or Or- ders, payable *otherwise* than on demand, and Promissory Notes, or *other* Notes, pay- able otherwise than to the *bearer* on *de-* *mand*.

	s.	d.
For any sum amounting to 40s. not exceeding £. 30	0	6
— exceeding £. 30 — 50	0	9
— exceeding 50 — 100	1	0
— exceeding 100 — 200	1	6
For any sum from 200 upwards	2	0

Duties on Promissory or *other* Notes payable to the *bearer* on *demand*, and re-issuable from time to time, after payment at the place where they were first issued.

	s.	d.
For sums amounting to 40s not exceeding 5 Guineas	0	3
— exceeding 5 Guineas — £. 30	0	6
— exceeding £. 30 — 50	0	9
— exceeding 50 — 100	1	0
— exceeding 100 — 200	1	6

Duties

Duties on promissory Notes, or *other* Notes, for the payment of money to the *bearer on demand*, re-issuable from time to time, after any payment at the *same* place, or any *other* place than where they were first issued.

With respect to Foreign Bills, drawn here in sets according to the custom of merchants, every Bill of each set is subject to a Stamp Duty as under:

	s.	d.
For sums not exceeding £. 100	0	6
For sums exceeding - 100 not exceeding £. 200	0	9
200 - - -	1	0

THE duties are payable by the drawers or makers of the bills or notes respectively; and the sheet or piece of vellum or parchment, or the sheet or piece of paper, on which the bills or notes are ingrossed, written, or printed, must be stamped *before* these are drawn; and the Commissioners and their officers are prohibited from stamping any vellum, &c. at any time *after* any Bill of Exchange, Promissory Note, or other Note, Draft, or Order, shall be ingrossed, written, or printed thereon.

AND it is enacted, that no Bill of Exchange, Promissory Note, or other Note, Draft, or Order, liable to the duties, shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, *unless* the vellum, &c. on which it shall be ingrossed, printed, written, or made, shall be stamped with a lawful stamp to denote the rate or duty, or some higher rate or duty in the Act contained.

It

§ 6. It is likewise enacted, that if any Bill &c. for the payment of any sum amounting to 40s. or upwards, be engrossed, &c. on vellum, &c. which shall not be stamped, &c. or which shall be stamped with a stamp of a lower denomination or value than by the Act directed, there shall be due, answered and paid to his Majesty, &c. the full rate or duty chargeable thereon, which shall be payable by and charged upon all and every person or persons, severally and respectively, who shall draw or make, and utter and negotiate, or cause to be drawn or made, and uttered and negotiated, any such Bill, &c. on such vellum, &c. not stamped, or stamped with such lower duty, his, her and their respective executors, administrators and assigns.

§ 10. AND any person who shall write or sign, or caused to be written or signed; or who shall accept or pay or cause to be accepted or paid, any of these instruments, without the proper stamp, shall, for every offence, forfeit the sum of £. 20.

§ 7. A PENALTY of £. 20 is also imposed on any person who shall re-issue any of the re-issuable Promissory Notes, otherwise than is permitted by the Act.

§ 24. THESE penalties may be sued for in any of the courts at Westminster, for offences committed in England; and in the Court of Exchequer, in Scotland, for offences committed there, by action of debt, bill, plaint, or information, in which no essoin, privilege, wager of law, nor more than one imparlance shall be allowed.

AND

AND any Justice of Peace, residing near s. 25. the place where the offence is committed, is authorised and required, on any information exhibited, or complaint made, to summon the party accused, and the witnesses on either side; and on due proof made, to give judgment for the penalty, and to issue his warrant for levying it on the goods of the offender; and unless they be redeemed within six days, to cause a sale to be made of the goods taken under the warrant, rendering to the party the overplus, if any; and if goods cannot be found sufficient to answer the penalty, to commit the offender to prison, there to remain for the space of three months, unless such pecuniary penalty shall be sooner paid and satisfied; but the justice may mitigate the penalty as he shall think fit, (reasonable costs and charges of the officers and informers, as well in making the discovery as in prosecuting the same, being always allowed, over and above such mitigation) so as such mitigation do not reduce the penalty to less than a moiety over and above the said costs and charges—provided that any one who shall feel himself aggrieved by the judgment of such justice, may, on giving security to the amount of such penalty, together with such costs as shall be awarded in case such judgment shall be affirmed, appeal to the next general quarter sessions for the county, riding, or place which shall happen after 14 days next after such conviction shall have been made, and of which appeal reasonable notice shall be given, who are empowered to

D

summon

summon and examine witnesses upon oath, and finally to hear and determine the same; and if the judgment be affirmed, the court may award the offender to pay such costs, occasioned by such appeal, as to them shall seem meet.

f. 27. AND if any one, being summoned to give evidence before such justice or justices, shall refuse to appear, without a reasonable excuse to be allowed by such justice or justices; or, appearing, shall refuse to give evidence, every such person shall forfeit the sum of 40s. to be levied in the same manner as directed with respect to the other penalties.

f. 24. 25. THE time limited for a common informer to sue in is three months, either in the superior courts or before justices of peace; and if a common informer sue within that time, the penalties are divided in moieties between the informer and the king.

f. 28. IF no informer sue within that time, then the penalties are only recoverable in the name of his Majesty's Attorney General in England, or Advocate in Scotland, by information in the respective courts; and the whole of the penalties go to the king.

f. 29. AND if any person shall counterfeit, or procure to be counterfeited, any stamp directed to be used by this Act; or shall counterfeit or resemble the impression of such stamp on any vellum, &c. or shall utter, vend, sell, or expose to sale, any vellum, &c. liable to the duties, with such counterfeit mark or impression, knowing the same to be counterfeited;

ed; or shall privately or fraudently use any stamp or mark directed by this Act to be used, with intent to defraud his Majesty, &c. he shall be adjudged a felon, and shall suffer death as in cases of felony, without benefit of clergy.

DRAFTS or Orders for the payment of money to the bearer on demand, bearing date on or before the day on which the same are issued, and at the place from which the same are drawn and issued, and drawn on any banker or bankers, or person or persons acting as a banker or bankers, and residing and transacting the business of a banker within ten miles of the place where such Draft or Order shall be actually drawn and issued, are exempted from the duty. f. 4.

AND all Promissory and other Notes and Bills issued by the Bank of England are exempted from any stamp duty, on consideration of the Governors and Company paying into the receipt of his Majesty's Exchequer the annual sum of £. 12,000, by half yearly payments. f. 5.

It is also provided, that nothing in the present Act shall be construed to give legality to any Bill of Exchange or Promissory Note which was not legal before. f. 12.

C H A P. II.

Who may make a BILL OF EXCHANGE or PROMISSORY NOTE, and be Parties in the Negotiation of them.

Vid. Stat.
5 R. II. c. 2.
Lutw. 891,
1585.

Carth. 82.
2 Vent. 292.
Comb. 152.
1 Show.
125. 2. Sho.
501. Lutw.
1585. 12.
Mod. 36,
380. Salk.
126.

BILLS of Exchange having been first introduced for the convenience of commerce, it was formerly thought that no person could draw one, or be concerned in the negotiation of it, who was not an actual merchant; but the multiplied concerns of society rendering it necessary for others, not at all engaged in trade, to adopt the same mode of remittance, it has been since decided that any person capable of binding himself by a contract, may draw or accept a Bill of Exchange, or be in any way engaged in the negotiation of it; and shall be considered as a merchant for that purpose; and that it is not necessary in a declaration on a Bill, to aver, that the defendant is a merchant.

ON the same principle, since the statute of Queen Anne, any man, though not a merchant, may be party to a Promissory Note.

AN infant, or one under the age of twenty-one, cannot be engaged in trade, and therefore, it being impossible that the fiction or supposition of being a merchant should extend to him, it has been determined that he cannot be sued on a Bill of Exchange, drawn in.

Carth. 150.

in the ordinary course of business ; and though it does not appear to have ever been expressly decided that he cannot be sued on a Promissory Note, yet as the same principle extends to the one as to the other, it is evident he cannot.

BUT as an infant *may* contract for necessaries, or for his education suitable to his rank in life, it may admit of some doubt whether a Bill of Exchange or Promissory Note given by him for either of these considerations, and expressed so to be in the body of them, would not bind him ; for though it be certain that even for *these* he cannot bind himself by a bond or other writing with a penalty, yet it has been frequently determined, that a single bond, that is, one *without* a penalty, given by an infant for necessaries, will bind him ; and unless the circumstance of the making a Bill of Exchange or Promissory Note, being a mercantile transaction, and of the total incapacity of an infant to be a merchant, be a sufficient reason for considering *any* Bill or Note in which an infant is concerned as invalid against him, there seems no reason why either, really given and expressed to be given by him for necessaries, may not be considered as equally binding with a single bond : for if it be said that the jury must inquire whether the articles mentioned as necessaries be really so or not, and into the reasonableness of the price, and therefore may give a less sum than that mentioned in the Bill or Note, it may be answered, that these objections hold equally against a single bond.

Co. Lit.
172. a.

Vid. March
145. 1. Ro.
Abr. 729.
Pl. 8. & 5.
Lev. 86.

Vid. 1 Term
Rep. 40.
Trueman v.
Hurst.

AN infant however may certainly sue on a Bill or Note, for that is for his benefit.

A MARRIED woman, in general, can bind herself by no conduct; nor can she, without a special authority, bind her husband, except it be for such necessities as are suitable to his rank: it is therefore clear that a Bill of Exchange or Promissory Note to which she is a party is of no force.

BUT there are cases in which a married woman is considered as having an existence independent of her husband, and then she may contract and be bound by her contract as if she were single; and in such cases she may, amongst other contracts, certainly be bound by a Bill of Exchange or Promissory Note.

These cases are,

3 Burr.

1776, 1784,

2 Bl. Rep.

1081.

1st. WHERE by particular custom in some places she is permitted to trade on her separate account; but in this case, if she be sued in a *superior* court, her husband must be joined for conformity, and he may plead the custom in bar.

1 Term.

Rep. 9.

2^{dly}. WHERE a woman lives apart from her husband under articles of separation, has a separate maintenance, and acts and receives credit as a single woman.

2. Pl. Rep.

1079.

BUT this does not extend to the case of a woman eloping from her husband, and living apart from him.

Co. Lit.

132. b.

133 a. Spar-

row v. Car-

ruthers,

3^{dly}. WHERE the husband is under a civil disability of being in the kingdom; as where he is banished, or has abjured the realm; or has been transported, though but for a term of years;

years ; or where the husband is an alien enemy, residing out of the kingdom. cited 2 Bal. Rep. 1197. & 1 Term.

NEITHER can a married woman, except in the foregoing cases, be the payee or indorsee of a Bill or Note, for she cannot sue, as she can possess no property in a capacity distinct from her husband. Rep. 7. 1 Ld Raym. 147 Salk. 116.

WHERE there are two joint traders, and a Bill is drawn on both of them, the acceptance of one binds the other, if it concern the joint trade, because they trade for a common benefit, and therefore where one of them gives credit, it is the act of them both : but it is otherwise if it concern the acceptor only, in a distinct interest and respect. And if a factor of an incorporated company draw a Bill on such company, and any member accept it, the acceptance shall not bind the company, nor any other member of it, because it is a private act of the party, and not a public act of the company. 1 Salk. 126. Gilb. 1. E. 117, 118. 1 Ld Raym. 175.

On the same principle, if ten merchants, each in his individual capacity, employ one factor, and he draw a Bill on all of them, and one accept it; this shall only bind him and not the rest, because they are separate in interest; the one from the other.

If on a dissolution of partnership between three partners a power be given to one of them to receive all debts due to the late partnership, and to pay all debts owing by it, this will not enable him afterwards to draw a Bill on one of the debtors of the partnership, and, on its being accepted, to indorse it in the name of the partnership ; 11 Br. Rep. C. B. 155. Kilgour v. Finlison & others.

partnership ; and consequently the indorsee cannot maintain an action on the Bill against the three as partners.

WHETHER a corporation, which has not a special power expressly given for the purpose, can be concerned in drawing or accepting a Bill of Exchange or Promissory Note, or in the negotiation of either, or can be made the payee, is a question which seems never to have had a consideration of a court ; perhaps, because nobody has ever entertained a doubt on this head ; and it seems to have been taken for granted by the legislature, and it is consistent with the general principles of law, that, by the intervention of an agent or servant, lawfully authorised, a corporation, on which no restraint is imposed in its original constitution, might in this respect act as a natural person. There is, however, a proviso in the Act, which puts Promissory Notes on the same footing with Bills of Exchange, that no body politic or corporate shall have power, by virtue of it, to issue or give out Notes, by themselves or their servants, other than such as they might have issued if this act had not been made.

*Vld. Edie
v East
India Com-
pany. 2
Bur 1216.
3 & 4 Ann.
c. 9. s. 3.*

*S. W. & M.
c. 20. s. 28.* THE Bank of England has a special power conferred on it for this purpose.

Mar. 26. IT is asserted by *Marius* and others, that the wife, servant, or friend of a merchant, cannot bind him by their acceptance, without a power of attorney in form ; but it is a common practice for some one of a merchant's clerks in the absence of his master, to accept Bills in his name ; and there is no doubt but,

at

at this day, though there should be no instrument made to either of the before-mentioned persons, yet if either of them have formerly, in the principal's absence, usually accepted his Bills, and he did not disapprove on his return, this will be as binding on him as if there had been a legal and formal instrument. Beaves
462.

SOMETIMES exchange is made in the name and for the account of a third person, by virtue of full power and authority given by him, and this is commonly termed *procuracion*; and such bills may be drawn, subscribed, indorsed, accepted, and negotiated, not in the name or for the account of the manager or transactor of any or all these branches of remittances, but in the name and for the account of the person who authorised him. Id. Ibid.

BUT a discreet man will not rashly hazard his substance by such a substitution; but if obliged by the necessity of his affairs, will act with the utmost circumspection in the choice of his agent; and when he has appointed him, he must advise those correspondents on whom such agent may occasionally want to draw, of his having given such a power, and desire them to honor the firm of his substitute, whenever used for his account. Id. Ibid.

AND he who by such a procuracion either negotiates, draws, indorses, subscribes or accepts Bills of Exchange, by subscribing his own name and quality, that is, as attorney of his employer, as effectually binds his principal, as if he himself affirmed, whilst the procurator is not in the least bound: but if any

one,

Id. Ibid.

one; under *pretence* of having a full power from a person of credit, transact business on his own account, he is bound, and not the person whose name he has used.

Id. 462.
5.

THE possessor of a bill must admit the acceptance of a procurator, provided his letter of attorney be general, or expressly declaring that all bills accepted by him are on account of the principal, or limited only to those bills which the possessor has; but if the procurator be not clear and express in these particulars, then the holder is not bound to admit the acceptance.

C H A P. III.

Of the Resemblance which BILLS OF EXCHANGE and PROMISSORY NOTES bear to one another; and of their different Kinds.

Per Lord
Mansfield,
in *Heylin*
v. Adamson.
2 *Bur.* 676.

A PROMISSORY Note, in its original form of a promise from one man to pay a sum of money to another, bears no resemblance to a Bill of Exchange. When it is indorsed, the resemblance begins, for then it is an order by the indorser to the maker of the note, who, by his promise, is his debtor to pay the money

money to the indorsee. This is the exact definition of a BILL OF EXCHANGE.

THE indorser of the note corresponds to the drawer of the bill; the maker to the drawee or acceptor; and the indorsee to the payee, or party to whom the bill is made payable.

WHEN this point of resemblance is once fixed, the law is fully settled to be exactly the same in Bills of Exchange and Promissory Notes; and as some confusion has arisen in the books from an inattention to the real analogy between them, it may be proper to observe, that whenever the law is reported to have been settled with respect to the acceptor of a bill, it is to be considered as applicable to the drawer, or, as he may, with more propriety, be called, the maker of a note; when with respect to the drawer of a bill, then to the first indorser of the note: the subsequent indorsers and indorsees bear an exact resemblance to one another.

BOTH bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man or bearer, or simply to the bearer.

THE first kind have always been held to be negociable, that is, transferable from one man to another: but where they were made payable to the order of such a man, exception has been taken to an action brought by that man himself, on the ground that he had only

an authority to indorse; but that exception

to Mod.
286 2
Show. 8.

was Comb. 402.

was not allowed, there being no difference, according to the custom of merchants, between "payable to the order of such a one," and "payable to such a one or order."

Mar. 14.
2 Show.
23. Mich.
34. Car. 2
B. R.

BILLS payable to bearer were originally thought to be equally negotiable with those payable to order. In the time of Charles II. one Hinton brought an action as bearer of a bill of this kind, against the drawer; no objection was made to his right to bring the action, only lord Pemberton said, he must entitle himself to it on a valuable consideration, for that if he happened to be the bearer by casualty or knavery, he should not have the benefit of it.

3 Lev. 299.
1 Salk. 125.
1 Lord
Raym. 180.
Nicholson
v. Sedgwick.

BUT in King William's time, a distinction was taken between a bill payable to J. S. or *bearer*, and J. S. or *order*: the former, it was said, was not assignable by the contract, so as to enable the indorsee to bring an action against the drawer or drawee, in case payment were refused, because no such authority was given to the party by the first contract, the effect being only to discharge the drawee if he paid it to the bearer, though the latter should come by the bill by finding, theft, or otherwise.

IT was also said, that dangers might arise, if, on a casual loss, the finder should become entitled as bearer, to maintain his action for it.

YET it was held, that as between the indorser and indorsee, the bill was good, and the indorser liable to an action for the money, for that the indorsement was in the nature of a new bill.

AND

AND even as between the bearer and the drawer, or drawee, if the plaintiff alledged a special custom in London, or any other place, for the bearer to have this action, and the defendant demurred, without traversing the custom by which he confessed it, though in truth no such custom did exist, the plaintiff recovered; because, said the court, though we are to take notice of the law of merchants, as part of the law of England, yet we cannot take notice of the custom of particular places, and the custom alledged in the declaration being *sufficient* to maintain the action, and that being confessed, the defendant admitted judgment against himself.

IN equity too, it was held even then, "that a bill payable to A. or bearer, was like so much money paid to whomsoever it was given; that whatever accounts or conditions might be between the party who gave the bill, and A. to whom it was given, yet it should never affect the bearer, but he should have his whole money." So that the whole interest was transferred to the bearer.

AND Holt held, that if a bank note were lost, payable to A. or bearer, and a stranger, who found it, transferred it to C. for good consideration, trover would not lie against C. because, by the course of trade, there is a property in the bearer.

AND in a subsequent case, which was fully investigated by the court, those cases in which the distinction was taken between bills payable to bearer and to order, were held to have been decided on erroneous principles.

1 Salk. 126.
3 Salk. 68.
12 Mod. 36.

1 Salk. 126.
1 Lord Raym. 738.

Grant v. Vaughan:
1 Bl. Rep. 485. 3 Bar. 1516.

E

FOR,

FOR, first, as to their not being intended by the contract to be assigned: the contrary of this is true; for when made payable to A. B. or bearer, it is clearly intended that they should be transferred in the most easy manner, even without indorsement.

As to the dangers arising from a casual loss, the bearer must shew it came to him fairly, on a good consideration, and then there is no more danger here than in losing an indorsed Bill of Exchange, made payable to A. B. or order.

AND as to any necessity that might be suggested of bringing the action in the name of the person to whom the bill was originally made payable, it may in many cases be impossible, because there may be no person originally named as the payee; many bills are payable to bearer only, without the insertion of any person's name; in the very case before the court, which was an action against the drawer by the bearer, who had innocently received it for a valuable consideration, from a person who either found it, or became possessed of it by some other accident:—the bill ran thus, “Pay to *Ship Fortune* or bearer:” however, if there were a person named, the reason will not hold, for that person may become bankrupt; may be indebted to the drawer, so as to give the drawer a right to *set off* such debt against the demand of the money due on the bill;—may not be found;—may refuse to lend his name, or may release;—so that if the courts of law should not allow the bearer to bring the action in his own name, there might be no relief at all. Be-
sides

fides, this would be giving a third person (the drawee) an option whether he would pay it to the bearer or not, an option which might be abused to unjust or corrupt purposes:

WITH respect to Promissory Notes payable to *bearer*, the statute of Queen Anne expressly makes them transferable in the same sentence in which it confers that privilege on notes payable to order: and as the professed intention of the statute was to put Promissory Notes on the same footing with Inland Bills of Exchange, the legislature must evidently be taken to have supposed that bills payable to bearer had that privilege before.

THERE has since been no doubt but that actions may be brought by bearers of such Promissory Notes against the drawers or makers. In one case a bank note stolen out of the mail, yet being negotiated and coming to the bearer fairly on a good consideration, was held recoverable. In another, the defendant gave a Shop Note to A. or bearer. A. lost it, and demanded the money at the house of the defendant. He was ready to pay it, provided A. would give bond, with two responsible sureties, (as is the custom in such cases) to indemnify him against the bearer, if the note should ever be demanded. A. not being able or willing to give that security, the defendant still refused, on which A. brought a bill in Chancery to compel the payment, but it was dismissed by Lord Hardwicke.

Miller v.
Race, 1
Bur. 452.

Walmley
v. Child.

11 Dec.
1749. 1

SO Bur. 459.

So that it is now decided law, that both Bills of Exchange and Promissory Notes payable to bearer, are equally transferable as those payable to order, and the transfer in both cases equally confers the right of action on the *bonâ fide* holder.

THE *mode* of transfer however is different; bills and notes payable to bearer are transferred by mere delivery, the others by indorsement.

THE bills and notes hitherto described are considered merely as a security for money.— But there is a species of each which is considered not barely as a security, but as money itself. These are bank notes, bankers' cash notes, and drafts on bankers, payable on demand.

BANK notes are not securities, nor documents for debts, nor are they esteemed as such: but they are treated as money or cash in the ordinary course and transactions of business by the common consent of mankind, which gives them the credit and currency of money to every effectual purpose. They are as much considered as money, as guineas themselves, or any other current coin used in common payments.

THEY pass by a will which bequeaths all the testator's money or cash. On Lord Ailesbury's will, 900*l.* in bank notes was considered as money: on payment of them, whenever a receipt is required, it is given as for so much money, not as for securities or notes.

So on bankruptcies, they cannot be followed as identical and distinguishable from money.

IF

Per Lord
Mansfield.
1 Bur 457.

Popham et
al' V. Bath-
urst et al' in
Chancery,
5th Nov.
1748.

IF they be lost indeed and found, an action will lie against the finder by the true owner, as it will also for money before it has passed in currency. But after they have come into the hands of a third person, in a fair course of dealing, they can no more be recovered of him than money under the same circumstances.

ON the annuity act too, which requires the real consideration of the annuity to be set forth in the memorial, though the whole consideration be described as *money*, and it appear that it was part money, part bank notes, that will be sufficient, bank notes being considered as money.

IT has never indeed been determined that a tender in bank notes is *at all events* a good tender; but if they have been offered, and no objection made on that account, the Court of King's Bench have considered it to be a good tender, because these notes pass in the world as cash: though the Lord Chancellor once suggested a doubt whether they were money.

BANKERS cash-notes, and drafts on bankers, are so far considered as money among merchants, that they receive them in payment as ready cash; and if the party receiving them do not, within a reasonable time, demand the money, he must bear the loss in case of the banker's failure: but what shall be construed to be a reasonable time has been subject to much doubt; it was formerly considered as a question of fact depending on the circumstances of the particular case, to be determined by a jury, the nature of the thing not admitting

17 G. III.
c. 26.
Wright v.
Reed, 3
Term Rep.
554.

Per Buller
Justice,
3 Term.
Rep. 554.

Hankey v.
Trotman.
Mich. 20.
Geo. II. 1.
Bl. Rep. 14

Vide page
infra.

mitting of any precise invariable rule ; but it is now established to be a question of law to be decided by the court, though the precise time is as undetermined as before.

1 Ld. Ray.
744.

IF, however, within such reasonable time, the money be demanded, and payment refused, he who gave the note must make it good.

1 Str. 415.

A MAN received in payment a goldsmith's note, (goldsmiths being then what bankers are now) at two in the afternoon, and next morning at nine presented it at the goldsmith's, who had a quarter of an hour before stoppt payment. It was held that no credit had been given to the goldsmith, and that therefore the party who gave the note must bear the loss.

1 Str. 416.

IN another case it appeared that the defendant had paid the plaintiffs, who were the Sword-blade company, two goldsmiths' notes at three in the afternoon ; the plaintiffs' servant the next morning left the notes with the goldsmiths, in order that they might have the money ready for him as he came back a clearing ; it being, as they proved, customary for the Bank and the Sword-blade company to send out their notes in the morning by their servant, who then left them, and called for the money as he returned in the evening ; and the goldsmiths on receiving the notes always cancelled them, and got the money told out against the time when it was usually called for.—The notes in this case were brought early in the morning, and received and cancelled ; and between four and five in the afternoon,

noon, the servant who left them called again for the money, when the goldsmiths had just stopped payment: upon which the servant takes new notes of the same tenor and date with the cancelled ones which he left in the morning. And because the plaintiffs had done nothing but what was usual, in leaving the notes, instead of taking the money on the first call in the morning, the Chief Justice* directed the jury to find for the plaintiffs, which they did.

* Pratt.

BUT in a subsequent case this practice was disapproved of. The plaintiff, who kept cash with the bank, had on *Saturday* left a note for 50*l.* on Cox and Cleeve: on Monday they gave it to the runner, who left it at the shop in the morning, and when he called in the evening, he found the bankers had stopped payment, on which he took a new note of the same tenor and date. King C. J. who tried the cause, directed the jury that it would be dangerous to suffer persons to deal with notes in this manner, and said that the Court of Common Pleas was of that opinion in a like case.

Hayward v.
Bank of
England.
1 Str. 550.

IN Hoar and Dacosta, it appeared that Woodward's note was paid to the plaintiff at twelve on the Friday, who put it into the bank at one; and the next morning at ten, the runner of the bank carried it to the shop with other notes to the value of 2600*l.* and left them (as usual) to call again for the money: he called at eleven, and they said their servant was gone to the Bank: he called again at two, and they said they were going to shut up, and refused

2 Str. 910.

refused to pay ; but paid small notes for two hours, and then stopped ; and the next morning notice was given to the defendant, who had paid the note to the plaintiff. It was insisted on the part of the defendant, that he should not suffer by the plaintiff's paying it into the Bank, who sent it with other notes ; whereas, if the note had been tendered by itself, it would have been paid. On the other hand it was contended, that if *no* demand had been made, there would have been no laches, as the goldsmith stopped payment within a day after the receipt. The Chief Justice said, there was no standing rule, but left it to the jury, who gave a verdict in favour of the plaintiff.

Fletcher v.
Sandys.

2 Str. 1248.

IN another case a Banker's Note was paid to the plaintiff after dinner, who sent it the next morning at nine, when the banker had stopped payment : and it was ruled that there was no laches in the plaintiff so as to fix the loss on him ; and that in all these cases there must be a reasonable time allowed, consistent with the nature of circulating paper credit.

2 Str. 1175.

BUT in the case of the East India Company against Chitty, it appeared that at half an hour after eleven in the morning of the 18th of January, the defendant being indebted to the plaintiffs, paid to the cashier a note of Caswell and Mount, goldsmiths, in Lombard-street ; they continued to pay all notes till the next day at two ; and immediately after they had stopped payment, the company's servant came with the note. On the examination

ation of merchants it was held, that the company had made it their own, by not sending it out the afternoon of the 18th, or at furthest the next morning, and there was a verdict for the defendant.

IN a late case the plaintiff took the defendant's draft on his bankers, Brown and Collinson; the next morning they stopped payment, and the defendant refused to give cash for his draft, alleging that if the plaintiff had presented it for payment as soon as he might have done after he received it, the bankers would have paid it. Lord Mansfield said the whole rested on custom; and the question to be determined was, whether the plaintiff was obliged to go to the bankers on the day on which he received the draft, for if he had, it appeared he would have been paid. It was unreasonable to suppose, that a tradesman should be compelled to run about the town with half a dozen drafts from Charing-cross to Lombard-street, and other places, on the same day. The jury were to consider that *twenty-four* hours was the usual time allowed, and the plaintiff kept it no longer from being paid, for the next day the town was alarmed by the bankers stopping payment. The jury however found for the defendant; and the Court of King's Bench is said to have rejected an application for a new trial.*

Beawes 482.

Sittings at
Guildhall
after Easter
Term,
1782.

ON

* But this appears to be a mistake in Beawes, who reports the case without a name; for all the circumstances correspond with those of Metcalfe and Hall, cited in a subsequent part of this treatise, in which a new trial was granted.

Beaues 482.

ON the whole, the best rule in these cases seems to be, that drafts on bankers, payable on demand, ought to be carried for payment on the very day on which they are received, if from the distance and situation of the parties that may conveniently be done ; and when it is considered that great part of the payments for the purchase of shares in the public funds is made by the purchasers in drafts on their bankers at the instant of making the transfer of the stock, it is certainly advisable to take the drafts for payment without delay.

C H A P. IV.

Of the Privileges of BILLS OF EXCHANGE and PROMISSORY NOTES, and the circumstances necessary to make them good.

BILLS and Notes having been introduced for the convenience of trade and commerce, are indulged with several privileges peculiar to themselves.

WITH reference to the modes by which the performance of contracts is secured, by the mere act of the parties, without the operation of law, or the intervention of any legal authority, they are usually considered as divided into

to two kinds, special and simple ; the first being those which are formally ascertained by deed or instrument under seal, the instrument itself being denominated a specialty ; the latter, such as are not ascertained by deed or instrument under seal, but are either mere verbal agreements, in which case the proof of them depends on oral testimony alone, or are reduced into writing without seal, for the purpose of a more easy proof, in which respect only, they are better than a mere verbal promise.

ONE circumstance, in which a contract by specialty is more highly privileged than a simple contract, is, that the law allows, in its favour, a distinct species of action, of which the specialty or instrument itself is the foundation, and in which no extrinsic facts are necessary to be stated, nor any consideration shewn but what appears on the face of the deed ; and where, from the nature of the deed, as in the case of a bond, the law does not require the insertion of any consideration, none is necessary to be set forth in the declaration ; the law giving that credit to the solemnity of the instrument, which presumes a good consideration, and imposing the necessity on the opposite party of shewing that it was improperly obtained.

Vid. 3 Bur.
1639. 1669.
1671.

BUT in actions founded on simple contracts, not only the circumstances of the case must be particularly stated, but a sufficient consideration must be shewn, on which the obligation to perform the contract arises ; and though the terms of the contract be reduced to writing,

no

no reference can be made to that writing as the special ground of the action ; it can only be used in evidence, as the proof of the contract stated in the declaration.

BUT Bills of Exchange and Promissory Notes, though, according to the general principles of the law, they are to be considered only as evidence of a simple contract, are yet in this respect regarded as specialties, and are indeed on the same footing with bonds ; for unless the contrary be shewn by the defendant, they are always presumed to have been made on a good consideration ; nor is it incumbent on the plaintiff, either to shew a consideration in his declaration or to prove it at the trial. However, though foreign bills were always entitled to this privilege, it was not without a considerable struggle that it was extended to inland bills : and notes are indebted for it to the statute of Queen Anne.

THE principal heads of distinction, under which personal property may be considered, are those of things in possession and things in action :—things in possession are those objects of property, to which a man not only has a right, but which he actually enjoys ;—things in action are those over which he has not actual dominion, but which he has only a right to recover by a suit at law : things in possession might in general always be assigned or transferred from one person to another ; but the jealousy of the common law, carefully guarding against that litigious disposition, which, it was thought, might be encouraged,
by

1 Bl. Rep.

445. Peckham v. Wood.

B. R. E.

18. G. III.

Vid. 2 Ld.

Raym. 758.

1 Bl. Rep.

487.

2 Bl. Com.

389.

Co. Lit.

214. 2 Bl.

Com, 442.

by permitting one man to purchase from another his right of prosecuting a suit, prohibited the transfer of things in action; and even now, when the improved state of commerce requires, and the law permits an actual assignment of such property, so much respect is paid to the ancient principle, that the form of assigning it is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession: and therefore when in common acceptation a debt or bond is said to be assigned over, it must still be sued for in the original creditor's name; the person to whom it is transferred being rather an attorney than an assignee.

Vid. 1
Term Rep.
26, 619.

BUT Bills of Exchange, though only securities, and consequently things in action, are so highly favoured in the law, that not only they are assignable or negociable without any fiction, but every person to whom they are transferred may maintain an action, in his own name, against any one who has before him, in the course of their negotiation, rendered himself responsible for their payment. The same privilege is conferred on Promissory Notes by the statute of Queen Anne.

BUT to be entitled to these privileges, the instrument or writing, which constitutes a good Bill of Exchange, according to the law, usage, and custom of merchants, or a good Note according to the statute, must have some good essential qualities, without which it can neither be the one nor the other.

Per L. C. J.
De Grey, 3
Will. 213.

Martin v.
Chauntry,
2 Str. 1271.

ONE of these qualities is, that it should be for the payment of money only, and not for the payment of money and the doing of some other act: thus a note to deliver up horses and a wharf, and to pay money at a particular day, cannot be reckoned a note within the statute: for these instruments being originally adopted for the convenience of remittance, and at this day considered only as securities for the future payment of money, must undertake only for that: and it must be money in specie, not in good East India bonds, or any thing else, which can itself be only considered as a security.

Bull. Nisi
Prius, 273.
Ed. 1785.

3 Willf. 213.

ANOTHER requisite quality is, that the instrument must carry with it a *personal* and certain credit given to the drawer or maker, not confined to credit on any particular fund.

BUT in the application of this principle, there seems to be a material distinction between Bills of Exchange and Promissory Notes. As to the former, where the fund is supposed to be in the hands of the drawee, the objection holds in its full force, not only because it may be uncertain whether the fund will be productive, but because the credit is not given to the person of the drawer; but where the fund, on account of which the money is payable, is either in the hands of the drawer, or where he is accountable for it, the objection will not hold, because the credit is personal to him, and the fund is only the consideration for his giving the bill.

WITH respect to a Promissory Note, though, in the analogy between the two species of instrument,

strument, when their form is incontestably good, the acceptor of the bill resembles the drawer of the note, yet with respect to this objection to their validity, there is a difference; for if the drawer of the note promise to pay out of a particular fund then within his power, the note will be good under the statute; the payment does not depend on the circumstance of the fund's proving unproductive or not, but there is an obligation on his personal credit, the bare making of the note being an acknowledgment that he has money in his hands.

THIS distinction is apparent in the following cases: Evans drew a bill on Joscelyne, requiring him to pay to Lassere 7l. per month, out of his *growing subsistence*, and to place it to his account; Joscelyne accepted it according to the tenor of the bill, but afterwards refused payment; on which Lassere brought an action in the Common Pleas, and obtained judgment: Joscelyne brought a writ of error in the King's Bench, on which the judgment was reversed, because it was not a bill within the custom of merchants; it concerned neither trade nor commerce, and being payable out of the growing subsistence of the drawer, if he died, or his subsistence were taken away, it was not to be paid; it might never be paid, and yet his credit be unimpeached.

Joscelyne
v. Lassere.
Fort. 281.
10 Mod.
294, 316.

JENNY and others made an instrument in these words, "Pray pay to——Herle 1945l. on demand, out of the money in your hands, belonging to the proprietors of the Devonshire mines, being part of the consideration money

Jenny v.
Herle, 1
Str. 591. 2
Ld. Raym.
1361. 8
Mod. 265.

money for the manor of West Buckley," and directed it to one Prat, who refused to accept it, on which Herle brought his action in the Common Pleas, as on a Bill of Exchange, against Jenny and the others, and had judgment; on which they brought a writ of error in the King's Bench, where the judgment was reversed, because this was not a Bill of Exchange, but a bare appointment to pay money out of a particular fund, and did not answer the necessity of trade, and if the party might be charged on such an instrument as this, then every man who gave his steward an order to pay money, might be charged as the drawer of a Bill of Exchange.

Dawkes &
ux. v. De-
lorane, 3
Wils. 207.
2 Bl. Rep.
782.

THE Earl of Delorane made an instrument in these words:

"SEVEN weeks after date please pay to Miss Read, thirty-two pounds and seventeen shillings out of W. Steward's money, as soon as you shall receive it, for

"Your humble servant,

"DELORANE."

"To TIM. BRECKNOCK, ESQ.

St. Mary-le-bone."

Accepted Timothy Brecknock.

BRECKNOCK refused to pay, on which an action was brought against the drawer as on a Bill of Exchange, but judgment was given against the plaintiff for this among other reasons, that it was payable out of a particular fund; and it being objected at the bar, that
this

this bill was accepted by Brecknock generally, and in an unlimited manner; it was answered by the court, that if the bill had been drawn accordingly in a general and unlimited way, both the bill and the acceptance would have been good, but the acceptance here must mean that Brecknock accepts it to pay out of Steward's money, not out of the drawer's.

ON the same principle which governed these cases, an order from the owner of a ship to the freighter, to pay money *on account of freight*, has been held to be no Bill of Exchange: Gibson, the owner, gave an order on Gilly and Company, the freighters of a ship, in these words:

Messrs. Gilly and Co.

"PRAY pay to Mr. Richard Banbury, one month after date, 200*l.* *on account of freight* of the Veale Galley, Edward Champion, and this shall be your sufficient discharge for the same.

"J. GIBSON."

THIS was accepted conditionally for Liffet and Gilly, and not being paid, an action was brought against the acceptors, and among other objections to the bill, the Chief Justice said, that it was payable out of a particular fund; but with deference to so great an authority, it is conceived, that if that had been the only objection to the instrument, it would have been a good bill, for its being payable *on account of freight*, seems to be no more than a direction to the drawees to what account between them and the drawer they are to place the payment.

F 2

HOWEVER,

Banbury v.
Liffet, 2
Str. 1211.

Lee.

Pierfon v.
Dunlop,
Doug. 571.

HOWEVER, such a bill from the freighters of a ship to the person to whom the freight is due, if good in other respects, would certainly not be bad because it was made payable *on account of freight*, because indisputably there is a *personal* credit given to the drawer, the words *on account of freight* only expressing the consideration for which the bill was given.

M'Leod v.
Snee, 2 Ld
Raym.
1481. 2 Str.
762. Barnard,
12.
K. B.

AND there may be cases where the instrument may appear at first sight to be payable out of a particular fund, and in reality be otherwise, of which description the following case is one :—A. B. drew a Bill of Exchange, dated 25th of May, by which he requested M'Leod "one month after date, to pay to Snee, or order, 9l. 10s. as his quarterly half-pay, to become due from the 24th of June to the 29th of September next by advance."—M'Leod accepted it, and on his refusal to pay, was sued in the Common Pleas, where judgment being given against him, he brought a writ of error in the King's Bench, and objected to the judgment that this case resembled the former cases, being payable out of a particular fund ; but the court held that this bill was drawn on the particular credit of the drawer, not on that of the half-pay, for it was to be paid as soon as the quarter began, and whether that should ever become due or not ; and the mention of the quarterly half-pay was only a direction how the drawee was to reimburse himself.

Burchell v.
Steeck, 2
Ld. Raym.
1545.

OF the distinction taken between Bills and Notes in this respect, the following is an illustration :—" I promise to pay to William

liam Burchell, the sum of 101l. 12s. three months after date, for value received out of the premises in Rosemary-lane, late in the possession of Thomas Rower Sherwin:" was held a good note under the statute.

ANOTHER essential quality to make a good bill or note is, that it must be absolutely payable at all events, and not depend on any particular circumstance which may or may not happen in the common course of things. —Of the application of this principle the following are examples:

THOMAS ROGERS made a Bill of Exchange, by which he requested Roger Lynch to pay to Henry Haydock, or order, the sum of 14l. 13s. out of a fifth payment, when it should become due; this was held not to be a good Bill of Exchange, on account of the uncertainty whether any fifth payment might ever become due, as well as on account of its being payable out of a particular fund.

Haydock v. Lynch, 2 Ld. Raym. 1563.

So, an order to pay money, "provided the terms mentioned in certain letters written by the drawer were complied with," is not a good bill, though the acceptance admit a compliance with those terms, for it was no bill until after such compliance, and if it was not a bill when drawn, it could never afterwards become one.

Kingston v. Long, B. R. M. 25 G. III. Bayley, Appendix, No. 2.

ITS uncertainty in this respect was one reason of the determination in the case of Dawkes against Delorane, it being an order to pay out of Steward's money, when received, which might never happen.

Ante, page 52.

So, a note "to pay a certain sum of money, or to render the body of J. S. to prison by such a day,"

Smith v. Boheme, cited 2 Ld. Raym. 1362, 1396.

a day," is not a note on which an action will lie by the statute, after failure of rendering the body to prison, because it was not necessarily and originally for payment of money, but only became so by matter *ex post facto*.

Appleby v.
Biddulph,
cit. 8 Mod.
363. 4 Vin.
240. pl. 16.

Beardesley
v. Baldwin,
2 Str. 1151.
Pearson v.
Garret 4
Mod. 242.

Roberts v.
Peake 1
Bur. 323.

So, neither is a note "promising to pay money, if another do not pay it within a limited time;" for this is only an eventual promise.

So, a note "to pay money so many days after the defendant should marry," is not good under the statute; for it depends on a contingency which may never happen.

So, a note "promising to pay to A. B. a sum of money, value received, on the death of a particular person, *provided* he leave me a sufficient sum to pay the same, *or if* I shall be otherwise able to pay it," is not good within the statute, because it is not absolutely payable at all events, but depends on two contingencies, neither of which may ever happen.

IN the case of notes, however, it is not necessary that the time of payment should be absolutely fixed; it is sufficient if, from the nature of the thing, the time must certainly arrive on which their payment is to depend.

Cobbe v.
Cofchan;
2 Str. 1217.

THUS a note "to pay to A. or order, six weeks after the death of the defendant's father, for value received," was held to be negotiable within the statute, for there was no contingency by which it might never become payable, but it was only uncertain as to the time, which, it was said, was the case of all bills payable after sight. There appears however

ever some little difference, for it is in the power of the holder of a bill payable after sight to reduce the time to a certainty.

So, a note "payable to an infant, when he the infant should come of age," and specifying the time when that was to be, viz. "on the 12th of June, 1750," was held to be negotiable within the statute, for it would have been clearly good, if it had been made payable on the 12th of June, 1750, which is a day certain, without mentioning that the plaintiff was then to come of age, and it is not the less certain from the addition of that circumstance.

Per Lord
Mansfield
Goss v.
Nelson, 1
Bur. 227.

THE words of engagement make the debt; and it is no direction to *another* person: the former part of the note is a promise to pay the money, and the rest is only fixing the particular time when it is to be paid. It is sufficient if it be certainly, and at all events, payable at that time, whether he live till then, or die in the interim.

AND a moral certainty is sufficient: it is not necessary that the time should be physically certain.

THUS, "a promise to pay within two months after such a ship shall be paid off," will make a good note: for the paying off of the ship is a thing of a public nature, and morally certain.

Andrews,
v. Franklin,
1 Str. 24.

So, "I promise to pay to George Pratt, or order, 8l. on the receipt of his the said George Pratt's wages, due from his Majesty's ship the *Suffolk*, it being in full for his wages, and prize money, and short allowance money for the said ship," was held a good note on the authority

Evans v.
Underwood
1 Will. 262,
263.

authority of the last case ; and there being an averment that the wages were received, the plaintiff recovered.

BUT this seems to be carrying the indulgence to these notes abundantly far.

IT is observable that of all these cases, where the time for the payment of the money is not absolutely fixed, there is not one arising on a Bill of Exchange : such a latitude seems incompatible with the nature and original intention of that instrument ; and its allowance in favour of Promissory Notes arises entirely from a liberal construction of the statute on which the negociability of these notes is founded.

IT must also be observed, that in most of the cases where the several instruments have been denied the privilege of Bills and Notes, it is not for that reason to be concluded that they are of no force : when the fund from which they are to be paid, can be proved to have been productive, or the contingency on which they depend has happened, they may be used as evidence of a contract, according to the circumstances of the case, or according to the relation in which the parties stand to one another.

Maber v.
Massias, 2
Bl. Rep.
1072.

WILLIAM WATTS, a merchant, who traded to Gibraltar, employed Moses Massias as his factor there, who used to consign Watts's goods to certain agents in Barbary for sale. Massias used to keep an account with the agents, and another with Watts, but Watts had no communication with the agents. On the 21st of May, 1772, Watts drew a bill in the following terms, for the balance of an
account

account that day stated between him and Maber and Kentish, merchants, with whom he had dealings :

" SIR, please to pay to Messrs. Maber and Kentish, or order, 195*l.* 14*s.* 10*d.* out of the produce of goods you have of mine, now lying at Gibraltar, Barbary, and Leghorn, as soon as the same shall come into your hands, after discharging the present acceptances.

" WILLIAM WATTS."

" *To Mr. Moses Massias,
No. 63, Prescot-Street.*"

Which bill Massias accepted in the following words underwritten : " I agree to conform to this order. MOSES MASSIAS."

BEFORE this bill was paid, Watts became a bankrupt, and Massias refusing payment, an action was brought against him for " money had and received to the use of the plaintiff." On the trial it appeared that Massias had large quantities of goods of Watts in his hands ; in 1773 to the amount of 1657*l.* and more in 1772. That he had paid large sums for Watts, but whether for engagements prior to 1772 or not, did not appear.

The defendant gave evidence of several prior engagements, but these did not cover the whole account ; and also that there was, at the time of acceptance, and still remained, a balance due to Massias himself of 870*l.*—There was a verdict for the plaintiff ; and an application being made by the defendant for a new trial, the court observed that the ques-
tion

tion was, whether the defendant had in his hands 195*l.* for the use of the plaintiff. He was proved to have had goods to the amount of 1657*l.* and that his acceptances, in the common and technical sense of the words, as applied to Bills of Exchange, together with certain other indorsements by which he had engaged himself to pay money for Watts, left a balance in his hands more than sufficient to pay the plaintiffs; if the balance of 870*l.* due to Massias himself, be excluded. For this balance, then unliquidated, it never could have been meant to provide, nor was it meant that the bill or its acceptance should be subject to it, for then there would have been fraud in the drawer, and also in the acceptor; both knew, or must be supposed to have known, at least Massias knew how the balance then stood. If he meant to have reserved his own balance, he should have made a special acceptance; but having accepted it generally in the terms of the draft, subject only to prior acceptances, he shall not shelter himself by this concealed balance due to himself in the course of a running account.

10 Mod.

287. 2 Ld.

Raym.

1397. 1 Str.

629. 1 Wilf.

263. 3 Wilf.

213.

No precise form of words is necessary to make a Bill of Exchange, or a Note, under the statute; any order which cannot be complied with, or promise which cannot be performed, without the payment of money, will make a good bill or note. Thus an order to deliver money, or a promise that such a one shall receive it, is equivalent to an order or promise to pay.

A QUESTION

A QUESTION arising on a note in these words ; " I promise to *account* with T. S. or his order, for 50l." it was objected that this importing only a promise to be accountable for the money, the maker was not obliged to pay it to the person to whom it was first given, or to the indorsee, but that he might account for it another way, by having laid it out in goods, or otherwise applied it. But the court held that a promise to account was the same as a promise to pay, more especially as it was to be accountable to A. or order, which implies an intention that it should be negotiated ; and it would be a strange construction to suppose that the meaning could be satisfied in any other way than the payment of money when there might be any number of indorsees.

Morris v. Lee, 1 Str. 639. 2. Ld. Raym. 1396. 8. Mod. 364.

NEITHER will the addition of extraneous circumstances vitiate a note. Thus, " I do acknowledge that Sir Andrew Chadwick has delivered me all the bonds and notes for which 400l. were paid him on account of Colonel Synge, and that Sir Andrew delivered me major Graham's receipt and bill on me for 10l. which 10l. and 15l. 5s. balance due to Sir Andrew, I am still indebted for, and do promise to pay ;" is good.

Chadwick v. Allen, 1. Str. 706.

THE words "value received," being in general inserted in bills and notes, there seems to have been some doubt, whether they were essential : in one case, where the want of these words was objected, a verdict was given on that account against the instrument, but that case seems to be a very doubtful authority :

Banbury v. Liffet, 2. in Str. 1212.

Dawkes, v. Delorane, 3 Wils. 207. in a subsequent case the same objection was made, but as the instrument was clearly defective on another ground, the court gave no opinion as to this point.

Fort. 282. Barnard, K. B. 282. 8 Mod. 267. 1 Show. 5. 497. 2 Ld. Raym. 1556, 1481. Lutw. 889. 1 Mod. ent. 310. ON several occasions it appears to have been said incidentally by the court, and at the bar, that these words are unnecessary.

White v. Ledwick, B. R. H. 25 G. III. Bayley, App. pendix, N. 3. AND the point is now fully settled, that they are not necessary; for as these instruments are always presumed to have been made on a valuable consideration, words which import no more cannot be essential.

Beawes, 490. BUT in France not only "value received" must be inserted in Bills of Exchange, but also the nature of that value, in consequence of an ordinance of the King, in March 1673, whether it was in money, merchandize, or other effects, to prevent several abuses which had crept into this branch of commerce, by the bare insertion only of "value received;" for it was common to give a note in payment of a Bill of Exchange, each having these words: and this practice was found to be of great prejudice to trade, by occasioning many failures, which it was the object of this ordinance to prevent; and in consequence of it, there are four sorts of Bills of Exchange in that country, the first expressing simply *value received*; the second, *value received in merchandize*; the third, *value in himself*; and the fourth, *value understood*. The first and second need no explanation, being alike in their

their negociation, and their distinction only answering some ends that may occur between the drawer and deliverer in case of failure or fraud. The third sort is when a merchant draws a Bill of Exchange on one who owes him money, which he sends to his friend or factor, to procure acceptance and payment, and as the acceptor is his debtor, an inconvenience might arise to him, should he insert "value received," simply, as his friend or factor might pretend it belonged to him, it appearing by the Bill that the drawer had received the value. The fourth is when a person, taking a Bill of Exchange from one on whose credit he cannot rely, gives the drawer his acknowledgment of receiving the Bill, the value of which he obliges himself to satisfy, on having advice that the bill is paid; but if the Bill return dishonoured, it is again exchanged for the Note, the drawer defraying the charges.

WHETHER it be essential to the constitution of a Bill of Exchange, that it should contain words which render it negociable, as "to order" or "to bearer," seems not, hitherto, to have received a direct judicial decision. There are two cases in which the want of such words was taken as an exception, but as there were other objections on which the Bill was in both cases held to be bad, it was not thought necessary to decide on that point.

Banbury v.
Liffet. 2
Str. 1212.
Dawkes v.
Delorane, 3
Will. 212.

In another case the same exception was taken and overruled, but under such circumstances as that the point was not generally determined. The defendant had given the plaintiff a draught on one Heddy, for the payment.

Chamberlyn
v. Delarive 2
Will. 353.

payment of a sum of money for work done by the plaintiff for the defendant: the plaintiff had neglected to demand payment for a considerable time after the draught was due; and in the mean time Heddy became insolvent. The plaintiff brought his action for work and labour, and the defendant at the trial proved his having given this draught to the plaintiff in payment. But that not being payable to the plaintiff or order, the jury considered it as not being a Bill of Exchange, and gave a verdict for the plaintiff. On an application for a new trial, the court thought it unnecessary to decide on the general question, whether words importing negociability were essential to the constitution of a Bill of Exchange, because they were of opinion that by accepting the draught, and keeping it so long after it became payable, the plaintiff had given credit to Heddy, and discharged the defendant.

IF, in a doubtful point, however, we might be allowed to reason on general principles, it would seem, that it being the original intention and the actual use of Bills of Exchange that they should be negotiable, such draughts as want these operative words are not entitled to be declared on as specialties, however they may be sufficient as evidence to maintain an action of another kind:

3. & 4 Ann.
c. 9. s. 1.

THE words in the preamble to the statute, which gives the same remedy on Promissory Notes as there was before on Inland Bills of Exchange, include only notes payable to order; those of the enacting clause only such as
are

are payable to order or bearer, and therefore in strict interpretation would seem not to confer that privilege on notes wanting such words, even if the want of them were no objection to Inland Bills of Exchange.

YET it has been ruled that such words are not necessary in notes, and that the person to whom they are made payable may maintain an action on them within the statute, against the maker. And there are several cases in the books of reports where such words were omitted, and no exception taken on that account. The reason of this indulgence to notes may be, that they have less reference to trade and distant commerce, being properly no more than engagements between party and party; and the statute being remedial, the benefit of it has been extended beyond the literal words.

Per Lord
Hardwicke:
Moore v.
Paine.
B. R. H.
222.

IT having been found by experience, that trade and commerce suffered materially from the circulation of Bills, Notes, and Draughts for very small sums, which passed as cash, and many of them being made payable under certain terms and restrictions with which the poorer sort of manufacturers, artificers, labourers and others could not comply, without subjecting themselves to great extortion and abuse, the legislature has thought proper to lay certain restraints on Bills or Notes under a limited sum.

Vid. Preamble
to St.
15. G. III.
c. 51

ALL Notes and Bills for the payment of any sum under twenty shillings, which had been

15 G. III.
c. 51.
s. 8.

G. 2.

been issued *before* the 24th of June, 1775, were made payable on demand.

- S. 1. NOTES and Bills for less than twenty shillings, issued *after* the 24th of June, 1775, are declared void. And any person publishing or uttering such Bills or Notes, or in any manner engaged in the negociation of them, is liable to a penalty of not more than twenty pounds, nor less than five, to be recovered and applied in the manner pointed out by the act, which was to continue for five years.
- S. 2.
- S. 13.

17. G. III. THE good effects of this act being found, further provisions for the same purpose were made by another two years after.
- c. 30.

- S. 1. ALL Promissory or other Notes, Bills of Exchange, or Draughts, or undertakings in writing, being negociable or transferable, for the payment of twenty shillings, or for any sum of money above that sum and less than five pounds, or on which twenty shillings, or above that sum and less than five pounds, shall remain undischarged, issued after the first of January, 1778, shall specify the names and places of abode of the persons respectively to whom or to whose order they shall be made payable; shall bear date before or at the time of drawing or issuing them, and not on any subsequent day; shall be made payable within the space of twenty-one days next after the day of the date; and shall not be transferable or negociable after the time limited for the payment: and every indorsement shall be made before the expiration of that time, and

and bear date at or before the time of making it, and shall specify the name and place of abode of the person or persons to whom or to whose order the money is to be paid : and the signing of every such note, &c. and also every indorsement, shall be attested by one subscribing witness at the least ; and all notes, &c. of the above description, not having these requisites, shall be utterly void.

THE same penalties, recoverable in the same way as in the former act, are imposed on every one uttering, publishing, or negotiating such notes, &c. without the requisites prescribed.

AND all negotiable notes, &c. issued before the 1st of January, for any sum between the sum of twenty shillings and five pounds, or on which twenty shillings, or less than five pounds, remained undischarged, are made payable on demand.

AND this act and the former act are continued not only for the residue of the five years of the former, but also for other five years.

AND by a subsequent statute, both the former are made perpetual.

27 G. III.
c. 16.

C H A P. V.

A C C E P T A N C E.

AN acceptance is an engagement to pay a Bill of Exchange according to the tenor of the acceptance.

THE making of a Promissory Note is equivalent to an acceptance of a Bill of Exchange, for it is an engagement to pay the money for which the note is given, and therefore nothing under this head is applicable to Promissory Notes.

THE circumstances which generally concur in the acceptance of a bill, are that the party to whom it is addressed, binds himself to the payment, *after* the bill has issued, *before* it has become due, and according to its tenor, by either subscribing his name, or writing the words "accepts," or "accepted," or "accepted, A. B." But as a man may be bound as acceptor, without any of these circumstances, it may be convenient to consider this subject under the following points of view.

FIRST, with respect to the manner in which an acceptance may be made; secondly, the time of making it; thirdly, the parties by whom and to whom it is made; fourthly, its different kinds; and, fifthly, what shall amount to an acceptance.

I. AN acceptance may be either written or verbal ; if the former, it may either be on the bill itself, or in some collateral writing.

IN *foreign* bills it has always been understood that a collateral or parol acceptance was sufficient. Mol 295.
300 Mar.
17. 1 Str.
648. 3 Bur.
1674.

IN an action against the acceptor of a foreign Bill of Exchange, it appeared that the acceptance was by a letter, in which the defendant said, I will pay it, if you will first let me send to my correspondent in Ireland. This was held as well as if the acceptance had been on the bill itself. Wilkinson
v. Lutwidge,
1 Str. 648.

IN another case it appeared that a foreign bill was drawn on the defendant, and on non-acceptance returned to the drawer ; afterwards, the defendant said to the plaintiff, if the bill come back I will pay it ; and on the return of the bill this was held to bind him as acceptor. Cox v.
Coleman,
Mich. 6.
G. II. cited
B. R. H.
75.

BUT on account of an ambiguity in the two statutes which extend the remedy for damages and costs to Inland Bills of Exchange, considerable doubts had arisen with respect to the validity of a verbal or collateral acceptance of them. 9 and 10
W. III.
c. 17. 3 & 4
Ann. c. 9.

THE statute of William, which gives that remedy for non-payment after acceptance, requires that acceptance to be by subscribing the bill by the party accepting. §. 1.

THE other statute provides, in express words, that no acceptance of any Inland Bill of Exchange shall be sufficient to charge any person whatever, unless it be underwritten, or indorsed in writing on the bill. §. 5.

* Two chief justices had at different periods after the making of these statutes, ruled that an acceptance by parol was sufficient to bind the acceptor.

† ANOTHER had afterwards held that such acceptance was not sufficient.

BUT this point is now finally settled by a solemn determination in the King's Bench in the time of Lord Hardwicke.

AN action was brought against the defendant as acceptor of an Inland Bill of Exchange, and at the trial the acceptance appeared to have been by parol, on which the point was reserved for the opinion of the court, and in delivering that opinion, Lord Hardwicke observed that the cases of foreign bills were not applicable to the question then before them, as it wholly depended on the construction of the acts of Parliament: the cases on inland Bills that had arisen since that act were indeed in point; but it was by no means settled in the court of Common Pleas, that this acceptance was not good: for that he had been informed by one of the judges of that court, that in a case which had lately come before them, of an action against the acceptor of a Bill of Exchange, exception had been taken at the first trial, that the acceptance was not in.

Eumley v.
Palmer, M.
8. G. II. 2
B. R. H.
74. 2 Str.
2006.

Em. v.
Holiday,
Nil. 3. G. II.

* Parker C. J. in *Holdsworth v. Thicary*, P. xi. Ann. B. R. and in *Smith v. Plunket*, Mich. 11 Ann. B. R. and Raymond C. J. in *Scott v. Anderson*, at Nil. Pri. M. 1 G. II.

† Eyre C. J. in *Reay v. Meggot*, at Nil. Pri. in London, Hil. 7 G. II. C. B.

in writing, and therefore not binding. On an application for a new trial, the court being informed that the opinion of Lord Raymond was in favor of the acceptance, all inclined to the same opinion. No final judgment was indeed given, because the defendant thought fit to acquiesce in the inclination of the court.

WITH respect to the Acts of Parliament, it must be allowed that they are both, and especially the last, very obscurely penned: they were made to give a remedy against the drawer for damages, interest, and costs, in case of non-acceptance or non payment by the drawee, for no such remedy existed at common law.

THE first gave that remedy, in case of non-payment after acceptance, but requires that the acceptance should be in writing under the bill, but no provision was made for the case of non-acceptance; the statute of Ann was to extend the remedy to that case; and the provisions of the two acts had evidently a reference to that remedy only: the fifth section of the last act indeed has express words; that no acceptance shall charge any person whatsoever, unless under-written or indorsed; and if these words stood singly, it would be difficult to maintain that any remedy lay against the acceptor, by reason of a parol acceptance: but the generality of these words is restrained by the words that immediately follow; that if such bill be not accepted by such underwriting or indorsement, no drawer shall be liable

to pay costs, damages, or interest on that account; so that the first general words are to be understood to relate to charging the drawer with interest and costs. Nothing is more common than for an act of parliament to have general words at first, which are afterwards restrained by more particular ones. And it has been said that this proviso was inserted by the committee, when there might not be so much time for drawing it up clearly, as if it had been done at the first drawing of the act.

THE proviso at the end of the act is also very material to the present question, "that nothing in the act contained shall be construed to discharge any remedy which might before have been had against the drawer, acceptor or indorser of any such bill; and such acceptance being clearly valid at common law, it cannot be construed to be rendered void by this statute.

Powell v.
Monnier, 1
Atk. 717.
(613.)

AND if a verbal acceptance be binding, there can be no doubt but an acceptance by letter will be so too.

3 Bur. 1663.
Doug. 284.
1 Atk. 715.
(611.)

II. THE acceptante is usually made between the time of issuing the bill and the time of payment; but it may also be made before the bill is issued, or after it has become due: when it is made before the bill is issued, it is rather an agreement to accept, than an actual acceptance, but such agreement is equally binding as an acceptance itself.

Jackson v.
Pigot, 1 Salk.
127. 1 Ld.
Raym. 364.
12 Mod.

WHEN the acceptance is made after the time of payment is elapsed, it is considered as a general

general promise to pay the money : and if it be to pay according to the tenor of the bill, this shall not invalidate the acceptance, though, the time being past, it be impossible to pay according to the tenor, but these words shall be rejected as surplusage.

III. ACCEPTANCE is usually made by the drawee, or person on whom the bill is drawn, and when made before the issuing of the bill, is hardly ever made by any other person ; but after the issuing of the bill, it frequently happens either that the drawee cannot be found, or refuses to accept, or that his credit is suspected, or he cannot, by reason of some disability, render himself responsible : in any of these cases, an acceptance by another person, in order either to prevent the return of the bill, to promote the negociation of it, or to save the reputation and prevent the prosecution of the drawer, or of some of the other parties, is not uncommon : such an acceptance is called an acceptance for the honour of the person on whose account it is made, the effect of which will be more particularly explained in a subsequent page.

THAT engagement which constitutes an acceptance is usually made to the holder of the bill, or to some person who has it in contemplation to receive it, and then the acceptor must answer to him, and to every one who either has had the bill before, or shall afterwards have it by indorsement : but it is frequently made to the drawer himself ; and then it may be binding on the party making
H the

211. Cath.
459 Mitford
v. Walcot, 1
Salk. 129.
1 Lord
Raym. 574.
12 Mod.
410.
Mal. 265.
Mar. 22.
Beawes.
456, 458.

the engagement or not, according to the circumstances of the case.

THE mere answer of a merchant to the drawer that he will "duly honour his bill," is not of itself an acceptance, unless accompanied with circumstances which may induce a third person to take the bill by indorsement: but if there be any such circumstances, it may amount to an acceptance, though the answer be contained in a letter to the drawer.

Beawes, 454.
Pierſon v.
Dunlop,
Cowp. 572,
574. 1 Atk.
715. (611).
Powell v.
Monnier.

AND an agreement to accept may be expressed in such terms as to put a third person in a better condition than the drawer. If one man, to give credit to another, make an absolute promise to accept his bill, the drawer, or any other person, may shew such promise on the exchange, to procure credit, and a third person advancing his money on it, has nothing to do with the equitable circumstances which may subsist between the drawer and acceptor.

IV. AN acceptance is generally according to the tenor of the bill, and then it is called a general and absolute acceptance.

BUT it may differ from the tenor in some material circumstances, and yet, as far as it goes, be binding on the acceptor.

Mar. 17, 22.
Wegertloſe
v. Keene,
1 Str. 214.
Mar. 21.

IT may be for a less sum than that mentioned in the bill: or it may be at an enlarged period, which is usually the case when a merchant on whom a bill is drawn has no effects of the drawer in his hands, and does not suppose he shall have any at the time of payment mentioned in the bill.

So,

So; the drawee may accept a bill which has no time mentioned for the payment; and which is held payable at sight; to pay at a distant period; and such acceptance will bind him.

Walker v.
Atwood, 11
Mod. 190.

A BILL was payable the first of January, the drawee accepted to pay the first of March; the holder struck out the first of March, and inserted the first of January; and when it was payable according to that date, presented it for payment, which the acceptor refused; on which the holder restored the acceptance to its original form; and the court held that it continued binding.

Price v.
Shute, P:
33. Car. II:
Beawes, 486.

So, the acceptance may direct the payment to be made at a place different from that mentioned in the bill, as at the house of a banker; in which case if the holder neglect to demand payment within a reasonable time, and the banker afterwards fail, he must stand to the loss.

Bishop v.
Chitty, 2
Str. 1195.

BUT if the banker continue solvent, the holder is not bound to prove a demand on the banker in an action against the acceptor.

Smith v.
Delafontaine,
B. R. T.
25 G. III:
Bayley
App. No. 52
Smith v.
Sear, E. 14:
G. II. Bul-
ler's N. P.
270.

So also the acceptance may differ from the tenor of the bill in its mode of payment, as to pay half in money, half in bills.

AN acceptance may also be conditional, as "to pay when certain goods consigned to the acceptor, and for which the bill is drawn, shall be sold;" for it would affect trade if factors were not allowed to use this caution when bills are drawn on them, before they have an opportunity to dispose of the goods.

Smith v.
Abbot, 2.
Str. 115.

So,

Julian v.
Shobrooke,
2 Wils. 9.

SO, an acceptance "on account of the ship Thetis when in cash for the said vessel's cargo" is sufficient to bind the acceptor.

Barbury v.
Lisset, 2
Str. 1212.

ON the same principle, an acceptance "to pay as remitted from the place where the person on whose account the acceptance is made resides," seems binding after the remittance made.

1 Term
Rep. 182.

BUT what shall be considered as an absolute or conditional acceptance is a question of law to be determined by the court, and is not to be left to the jury.

Wilkinson
v. Lutwidge,
1 Str. 648,

A BILL was drawn in New England for a sum of money advanced there, for the repairs of a ship, of which Lutwidge, the drawee, residing at Whitehaven, was the freighter.—Wilkinson, the holder of the bill, applied to a merchant in London, to send the bill to Lutwidge for acceptance: the merchant sent it inclosed to the drawee, who by letter acknowledged the receipt, and wrote thus; "The bill which you sent me I will pay, in case the owners of the Queen Ann do not; and they living in Dublin, I must first apply to them; I hope to have their answer in a week or ten days: I do not expect they will pay it, but I judge it proper to take their advice before I do, with which I request you will acquaint Mr. Wilkinson, and that he may rest satisfied of the payment." In another letter he writes, "I have not had an opportunity of sending the bill to Ireland, but will take the first opportunity, and then will remit to the gentlemen concerned, according to my promise." The bill not being paid, an action

action was brought against Lutwidge, as acceptor, in which he insisted that these letters did not amount to an absolute acceptance, but were only conditional, to pay in the case the owners of the *Queen Ann* did not; and that his promise to procure payment from them was in favour of the plaintiff; but the chief justice thought it was rather in favour of himself; that the letters were a complete acceptance, and amounted to this; that he wished the holder of the bill to give him time to write to Ireland, but assured him that at all events the money should be secured; whether the owners of the *Queen Ann* paid it or not. Raymoud

A BILL was drawn on Mathews, payable to one Lenox, or order, and by indorsement came into the hands of Sproat; Sproat's clerk presented the bill for acceptance to Mathews, who lived in London, and who told him, "that the drawer had consigned a ship and cargo to him and another person in Bristol; but as he could not then tell whether the ship would arrive at London, or Bristol, he could not accept at that time:" the clerk, by the consent of Mathews, left the bill, and afterwards called, in company with his master, to know whether Mathews would accept the bill or not; who, on being pressed, declared, "the bill was a good one; and would be paid, even if the ship were lost." Sproat v.
Mathews,
1 Term
Rep. 182.

THE court held that this was only a conditional, not an absolute acceptance. Mathews had three events in contemplation; the arrival of the ship at Bristol, her arrival at London

Mason v.
Hunt,
Doug. 297.

As, if a merchant undertake to accept bills to a certain amount, on condition that a cargo of an equal value be consigned to him, and an order given for insurance. If the cargo consigned do not equal the value, he is not bound to accept.

Mar. 17.
Mol. 1. 2.
c. 10. f. 20.
Beawes,
455. Gilb.
L. E. 118.
3 Bur. 1674.

V. A. SMALL matter will frequently amount to an acceptance, according to the circumstances of the case: thus, if the merchant say, leave the bill with me, and to-morrow I will accept it; this is an acceptance, for it gives credit to the bill, and prevents the holder from taking the necessary steps against the drawer.

Mol. 279.
280. 3 Bac.
Abr. 610.
Mar. 17.
Gil. L. E.
118.

BUT if the merchant say, leave the bill with me, and I will look over my books and accounts between the drawer and me; call to-morrow, and accordingly the bill shall be accepted; this is no complete acceptance, because it depends on the balance of the account, and on the merchant's having effects in his hands to answer it, so that he gives no absolute credit to the bill.

Comb. 40.

ANY thing written on the bill by the drawee, not expressing a direct refusal to accept, as "accepted," "presented," "seen," will, if unexplained by other circumstances, amount to an acceptance.

Moor v.
Withy,
Trin. 10.
G. III. B.
R. Bul. Ni.
Br. 270.

So, a direction to a third person to pay the money is an acceptance. The drawee of a bill underwrote it thus; "Mr. Jackson, please to pay this bill, and charge it to Mr. Newton's account." It was contended that this was not an acceptance, for that the party did not mean to become the principal debtor. It was only

only a direction to Jackson, to pay out of a particular fund. But the court held, that the underwriting being a direction to pay the sum, it was of no importance to what account it was to be placed when paid : that was a transaction between the parties themselves, and this was a sufficient acceptance.

A BILL was sent to the drawee for acceptance ; he kept it for ten days before it became due without any objection ; and whilst it continued in his hands, he entered it in his bill-book, under a particular number, and wrote the number on the bill, and at the bottom the day when it would become due, and then sent it back, refusing to accept it : it was proved that it was the common practice of the drawee to enter and mark all bills in the same manner, whether he intended to accept them or not : the court seemed to think that these circumstances alone did not amount to an acceptance.

Powell v.
Monnier,
1 Atk. 717
(612.)

If a merchant be desired to accept a bill on the account of another, and to draw on a third, in order to reimburse himself, and in consequence he draw a bill on that third person ; the bare act of drawing this bill will not amount to an acceptance of the other, for the party evidently shews he meant only to make himself liable, in case the bill drawn by him should be accepted and paid.

Smith v.
Nissen, 1
Term Rep.
269.

An agreement to accept or honour a bill will, in many cases, be equivalent to an acceptance, and whether that agreement be merely verbal or in writing is immaterial :

Beaves, 468

If A. having given or intending to give credit to B. write to C. to know whether he will accept such bills as shall be drawn on him on B's. account, and C. return for answer that he will accept them ; this is equivalent to an acceptance, and a subsequent prohibition to draw on him on B's. account will be of no avail, if, in fact, previous to that prohibition, the credit has been given.

Pillans v.
Van Mierop,
3 Bur. 1663.

WHITE, a merchant in Ireland, desired to draw on the plaintiffs, Pillans and Rose, merchants at Rotterdam, for 800l. payable to one Clifford, and proposed to give them credit on a good house in London for their reimbursement, or any other mode of reimbursement: the plaintiffs, in answer, desired a confirmed credit on a house of rank in London, as the condition of their accepting the bill: White named the house of the defendants as that house of rank: the plaintiffs honoured the draft, and paid the money, and then wrote to the defendants, Van Mierop and Hopkins, merchants in London, desiring to know whether they would accept such bills as the plaintiffs should in about a month's time draw on their house for 800l. on the credit of White: the defendants agreed to honour the bill; but before it was drawn, White failed, and then the defendants wrote to the plaintiffs, informing them that White had stopped payment, and desiring them not to draw, as they could not accept their draught. The plaintiffs however drew, holding the defend-

ants.

ants not at liberty to withdraw their engagement.

ON behalf of the defendants it was argued, that the letter in which they promised to honor the plaintiffs' bill imported a credit given to the plaintiffs in prospect of a future credit to be given by them to White; for the letter of the plaintiffs, to which that of the defendants was an answer, only intimated an intention of giving credit to White, on condition of a credit from the defendants; and that therefore this credit might well be countermanded before the advancement of money. But the real transaction between the plaintiffs and White was very different from that represented to the defendants; the former had accepted White's bill a considerable time before the latter had undertaken to honour their draught, and consequently could not be considered as having been influenced by that engagement. That this transaction has been fraudently concealed from the defendants both by White and the plaintiffs; if it had been disclosed, the defendants would have plainly seen, that the plaintiffs doubted of White's sufficiency, by their requiring a further security for a debt already contracted: and that therefore this concealment of circumstances was sufficient to vitiate the contract. It was likewise void for want of consideration, it being like a promise to pay another man's debt contracted before the promise, which was a past consideration, and therefore no more than a naked agreement,

greement, which was not sufficient to maintain an action.

To this it was answered, that if indeed there were any fraud in the transaction, that would have been sufficient to vacate the contract; but it was manifest that none existed here, nor were the defendants deceived into a belief that the credit to White was future: the plaintiffs' letter imported only a wish to be informed, whether the defendants would accept bills on White's account, which they, by their answer, consented to do. The plaintiffs did not seem at the time to have doubted of White's sufficiency, or to have meant to conceal any thing from the defendants.—The draught by White on the plaintiffs, payable to Clifford was no part of the consideration of the engagement of the defendants; that, and all the precedent correspondence, was entirely out of the case.—By promising to honour the plaintiffs' draughts, the defendants admitted that they either had effects of White in their hands, or that they had credit on him. There was no pretence for the objection of this being a naked agreement: whatever might be said in other cases of a naked agreement, or the want of a consideration, there was no such thing in the custom of merchants with respect to Bills of Exchange. The true reason why the acceptance of a Bill of Exchange shall bind, is not on account of the acceptor's having, or being supposed to have, effects in his hands, but from the convenience of trade and commerce: the acceptance is an obligation to pay,

pay, though the acceptor have no effects of the person on whose account the bill is drawn, and though there be no consideration. The end of the institution of bills, their currency, requires that it should be so. This case is the same as if White had drawn on Van Mierop and Hopkins, payable to the plaintiffs: it would have been immaterial to the plaintiffs whether Van Mierop and Hopkins had effects of White or not, if they had accepted his bill: what was done here amounts to the same thing; to promise to give the bill due honour is, in effect, to accept it: if a man agree to do the formal part, the law, in the case of an acceptance of a bill, considers it as actually done: the defendants could not afterwards retract; it would be destructive to trade and credit if they might. There is no analogy between this case and a promise to pay another man's debts already contracted. It is a transaction of quite a different nature. If a consideration were necessary, there is here a sufficient one. Any damage to another, or forbearance or suspension of the assertion of his right, is a sufficient foundation for an undertaking, and will make it binding, though no actual benefit accrue to the party who undertakes. Here the engagement of the defendants occasioned a possibility of loss to the plaintiffs; it is plain they would not rely on White's assurance alone, and therefore they wrote to the defendants to know if they would honour their draught: by engaging to do so, they prevented the plaintiffs from calling on
White

White to perform his agreement, by giving them credit on a good house in London for a reimbursement. The suspension of the plaintiff's right, to call on White for a compliance with his agreement, is a consideration sufficient to maintain an action, if that suspension be only for a day, or for ever so short a time.

IF a bill be drawn on a servant, with a direction to place the money to the account of his master, and the servant accept it generally, this renders him liable to answer personally to an indorsee.

Thomas v.
Bishop, 2
Str. 955.
B. R. H. 1.

A BILL of Exchange was drawn in this manner: "At thirty days sight, pay to John Somerville, or order, 200l. and place the same to the account of the York-buildings company, value received by yours, Charles Mildmay." Directed to Mr. Humphrey Bishop, cashier of the York-buildings company, at their house in Winchester-street, London.— "Accepted, H. Bishop, 13th June, 1732." This bill was indorsed to Thomas, who brought an action against Bishop as the acceptor. At the trial the defendant proved, that the letter of advice was addressed to the company; and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner as he had accepted other bills: but it was determined that this evidence was immaterial. The bill, on the face of it, imported to be drawn on the defendant; it was accepted by him generally, not as servant to the company, to whose account he had no right to charge it, till actual payment by himself:

self : and this being an action by an indorsee, it would be of dangerous consequence to trade to admit evidence, arising from extrinsic circumstances, such as the letter of advice. This differed widely from the case of a bill addressed to the master, and subscribed by the servant. A Bill of Exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing ; there is nothing in writing here to bind the company, nor can any action be maintained against them upon the bill ; for the addition of cashier to the defendant's name, is only to denote the person with more certainty ; the house of the York-buildings company, is to inform the indorsee where the drawee is to be found, and the direction to whose account to place the money, is for the use of the drawee only. It might have been otherwise, had the action been by the payee, who was privy to the transaction, and if it had appeared that he tendered the bill as a bill on the company : but this plaintiff being a stranger, those circumstances could not be considered.

C H A P. VI.

Transfer of BILLS and NOTES.

ACCORDING to the difference in the style of negociability of Bills and Notes, the modes of their transfer also differ.

BILLS and Notes payable to bearer are transferred by delivery: if payable to J. S. or bearer, they are payable to bearer as if J. S. were not mentioned.

1 Bur. 452.
3 Bur. 1516.
1 Bl. Rep.
485.

BUT to the transfer of those payable to order, it is necessary, in addition to delivery, that there should be something by which the payee may appear to express his order. This additional circumstance is an indorsement, so called from being usually written on the back, though without doubt, an order of transfer would be equally valid, if written at the bottom or on the face of the instrument.

WHERE no regulation is made by act of parliament relative to the negociation of bills or notes, no particular form of words is necessary to make an indorsement, only the name of the indorser must appear upon it, and it must be written or signed by him, or by some person authorised by him for that purpose.

INDORSEMENTS

INDORSEMENTS are either in full or in blank; a full indorsement is that by which the indorser orders the money to be paid to some particular person by name. A blank indorsement consists only of the name of the indorser.

A BLANK indorsement renders the bill or note afterwards transferable by delivery only, as if it were payable to bearer, for by only writing his name, the indorser shews his intention that the instrument should have a general currency, and be transferred by every possessor. Doug. 617.
(639.) 611.
(633.)

BLANK indorsements are more frequent than those in full, because, if every indorsement were in full, the back of the instrument would be soon filled up, and its negociability would be less extensive.

EXCEPT where restrained by act of parliament, the transfer of a bill or note may be made at any time after it has issued, even after the day of payment; and in case of the former where the acceptor resides at a distance from the drawer, is frequently made before acceptance. 1 Ld. Ray.
575. Vid.
3 Term
Rep. 80.
Vid. 3 Bur.
1516. 1 Bl.
Rep. 485.
Doug. 611.
(633.)

AND where the transfer is by indorsement, that indorsement may be made on a blank note, before the insertion of any date or sum of money, in which case, the indorser is liable for any sum, at any time of payment that may afterwards be inserted; and it is immaterial whether the person taking the note on the credit of the indorsement knew whether it was made before the drawing of the note or not; for in such a case the indorsement is equivalent to a letter of credit for any indefinite sum. Vid. 1 H.
Bl. Rep.
88, 89.

Russel v.
Langstaffe,
Doug. 496.
(514.)

ONE Galley having had frequent money transactions with Russel, a banker, and having overdrawn his cash account; Russel suspecting his credit, refused to advance him any more money, without the addition of the name of some indorser of whom he should approve: on this Galley applied to Langstaffe, who indorsed his name on five copper-plate checks, made in the form of Promissory Notes, but in blank, that is, without any sum, date, or time of payment, mentioned in the body of the notes. Galley afterwards filled up the blanks with different sums and dates, and Russel discounted the notes. Galley became a bankrupt, and Russel demanded payment of Langstaffe, and, on his refusal, brought an action in which the court thought he was entitled to recover, though it appeared that he knew the notes were blank at the time of the indorsement.

Bank of
England v.
Newman, 1.
Ld. Raym.
442, 12.
Mod. 241.
Lambert v.
Pack, 1
Salk. 128.
7th resolution.

IT is said, that on a transfer by delivery, the person making it ceases to be a party to the bill or note; that such a transfer is a sale, and that he who sells it, does not become a new security, and is not liable to refund the money if the bill should not be paid.

BUT this can only be true to its full extent when applied to the case of a demand by a subsequent party when one or more have intervened between him and the party against whom he makes the demand: as between the immediate parties to the transfer, this distinction must be taken, that when the bill or note has

has been given in payment of a precedent debt, or for a valuable consideration at the time of the transfer, without being discounted; then, though the person who has given the money for the bill or note cannot recover against the person who received it, as indorser, yet he may certainly recover in an action for money had and received for his use, as the transferer must be understood to undertake that the bill shall be duly paid. But if the bill or note be *discounted* for the accommodation of the transferer, then the transfer is a sale, and the doctrine here laid down will apply.

IN a case which has lately occurred, and which has some relation to this subject, the circumstances which appeared on a motion for a new trial were these:

THE action was for money lent, money paid by the plaintiffs to the use of the defendants, and money had and received by the defendants to the use of the plaintiffs. The defendants having a Bill of Exchange, which came to them by indorsement, and wishing to have it discounted, employed Francis Huet for that purpose, telling him to carry it to market and to get cash for it, but that they would not indorse it. F. Huet applied to his brother, James Huet, to get the bill discounted, informing him that it belonged to the defendants, and that though they did not choose to indorse it, yet he added, as a reason of his own, that as their number was on the bill, it was equivalent to an indorsement, and that he (F. Huet) would indemnify him if he indorsed.

James

Feen v.
Harrison, 3
Term Rep.
757.

James Huet applied to the plaintiffs, who discounted it, relying chiefly on the credit of the acceptors, not knowing at the time that the defendants had any concern with it, but they required the indorsement of James Huet, which he gave, because, without that, the plaintiffs refused to discount the bill. Afterwards, on the failure of the acceptors, the plaintiffs having heard that the bill had passed through the hands of the defendants, applied to them for payment, who at first refused, but afterwards promised to take it up; and on their not performing their promise, brought the present action to recover the amount, and obtained a verdict.

THE application for a new trial was founded on the idea that the promise of the defendants was without consideration, and consequently was a *nudum pactum*.

IN opposition to this application, it was contended, that the promise was binding on the defendants, whether considered as given by them when under a *moral* obligation to pay, or as having received a *legal and valuable consideration* for it. It could not, it was said, be denied that so much money belonging to the plaintiffs had got into the pockets of the defendants for which the former had received no consideration. This was a sum, therefore, which, in conscience and morality, the defendants were bound to pay to the plaintiffs; that this alone, though there were strictly no legal debt, was a sufficient consideration to raise a promise; but the circumstances of the

the transaction amounted to a valuable and legal consideration: the plaintiffs had a right of action against James Huet, who, as an innocent man, and not involved in the misconduct of his brother, had a claim on the defendants; for as James Huet, in putting his indorsement on the bill, acted by the direction of his brother, who was the avowed agent of the defendants, though F. Huet might have exceeded his authority, they must be bound to his act, and were therefore liable to James Huet. But it did not appear that he had; for the only restraint imposed on him by the defendants was not to indorse *their names*, because they did not wish their names should appear on the bill: but they did not mean to restrain *him* from indorsing it, or any other person for him, provided the money could not be raised on any other terms, and that had turned out to be the case.

THE argument in favor of the defendants turned principally on the distinction between a general and a circumscribed authority. If Francis Huet had been the *general* agent of the defendants, it was admitted, that they would have been chargeable with his acts—but it appeared from the facts, that he was constituted their *particular* agent with a *circumscribed* authority; the substance of which was, that he would *sell* the bill; for that they would not make themselves liable, either on the bill by their indorsement, or by any other circuitous mode. F. Huet, it was agreed, would be liable to James Huet, either as for money paid to his use, or on the express promise to guarantee; but there the matter stopped;

stopped; for as to the defendants, he would pay the money in his own wrong, having exceeded his authority: the result must be, that as between these parties, the plaintiffs had no equity, and the defendants were not under any legal or moral obligation whatever to pay the amount of the bill: this was a new attempt, and it was difficult to say to what extent it might be carried, if it were encouraged: in the case of a Bill of Exchange it was precisely known what remedy the holder had, if the bill were not paid; his security appeared wholly in the face of the bill itself: the acceptor, the drawer and the indorsers were all liable in their turns: but they were only liable because they had written their names on the bill. But this was an attempt to make some other persons liable, whose names did not appear on the bill, and that too under circumstances very alarming to mercantile houses through which Bills of Exchange pass. Indorsers, whose names were on the bill, could not be called on, after notice of non-payment, and without delay. But if these defendants were answerable, by what rule was the court to be guided? Were the defendants to be called upon at any distance of time? When a person *refused* to indorse a bill, it could not be implied that he meant to make himself liable on the bill, much less in a more extensive way than if he had indorsed it. On these grounds the rule was made absolute for a new trial. On the next trial, the evidence was the same as before, in every other respect, but that when the defendants desired F. Huet to get the bill discounted, *they*
did

did not say that they would not indorse it.— 4 Term
 The jury found a verdict for the plaintiffs; Rep. 177.
 and on a motion for another trial, the court were unanimously of opinion that it should not be granted, on the ground, that as the defendants had authorised F. Huet to get the bill discounted, without restraining his authority as to the mode of doing it, they were bound by his acts; and that if it were doubtful, from the conversation which passed between the defendants and F. Huet, at the time when they applied to him to get the bill discounted, what authority they meant to confer on him in this transaction, their subsequent conduct, in promising to pay the bill, was decisive. But the three Judges, Ashurst, Buller, and Grose, said, that had not the evidence given on this trial varied from that given before, they should have continued to entertain the same opinion which they delivered on the former occasion.

THOUGH a blank indorsement be a sufficient transfer, and may enable the person in whose favour it is made to negotiate the instrument, yet it is in his option to take it, either as indorsee or as servant or agent to the indorser, and the latter may, notwithstanding his indorsement, declare as holder in an action against the drawer or acceptor. Nothing is more usual than for the holder of a bill or note, to indorse it in blank, and send it to some friend for the purpose of procuring the acceptance or the payment; in this case it is in the power of his friend, either to fill up the blank space over the indorser's name with an order

Clark v.
 Pigot, 1.
 Salk. 125.
 Dehors v.
 Harriot, 1.
 Show 163.
 Lambert v.
 Pack, 1.
 Salk. 128.
 6th resolution.
 Lucas v. Haynes,
 1. Salk. 130.
 2 Lord
 Raym. 871.

order to pay the money to himself, which shews his election to take as indorsee, or to write a receipt, which shews that he is only the agent of the indorser.

Lucas v.
Haynes, 1
Saik 130.
2 Lord
Raym. 871.

ON this principle, a man to whom a bill was delivered with a blank indorsement, and who carried it for acceptance, was admitted, in an action of trover for the bill against the drawee, to prove the delivery of it to the latter.

2 Bur. 1216.

THE original contract on negociable bills and notes is to pay to such person or persons, as the payee or his indorsee, or their indorsee, shall direct; and there is as much privacy between the last indorser and the last indorsee, as between the drawer and the original payee. When the payee assigns it over, he does it by the law of merchants; for as a thing in action, it is not assignable by the general law. The indorsement is part of the original contract, is incidental to it in the nature of the thing, and must be understood to be made in the same manner as the instrument was drawn; the indorsee holds it in the same manner, and with the same privileges, qualities, and advantages as the original payee, as a transferable negociable instrument, which he may indorse over to another, and that other to a third, and so on at pleasure; and therefore an indorser, where he indorses it for a valuable consideration, cannot limit his indorsement by any restriction on the indorsee, so as to preclude him from transferring it to another as a thing negociable.

ON these principles it has been several times solemnly settled, that it is no objection to

to the claim of an indorsee, that the indorsement to him does not contain the words "to order."

IN one case it appeared that Manning had given a Promissory Note to Statham or order; Statham assigned to Witherhead, and Witherhead to More, who, on non-payment at the time, brought an action against Manning: on a demurrer to the declaration, exception was taken, that the assignment to Witherhead was made without saying to him or order, and that therefore he could not assign it over to More. But it was held by the whole court that the indorsement was sufficient; for if the original note be assigned, then, to whomsoever it may be assigned, he has the whole interest in it, and may assign it as he pleases; an assignment to him comprehends his assigns.

More v. Manning, Comyns 311. in C. B. Hil. 6 G. I. cited 2 Bur. 1222.

IN another case the plaintiff had declared on an indorsement made by William Abercrombie, by which he appointed the payment to be to Louisa Acheson, "or order;" on the bill being produced in evidence, it appeared to be originally made payable to Abercrombie or order, but Abercrombie's indorsement was only this; "pray pay the contents to Louisa Acheson." It was objected "that the indorsement did not agree with the declaration." The court however gave judgment on the ground of a general proposition in law, that a bill is negotiable without the addition of those words to the indorsement; the legal import of such indorsement being, that the bill was payable to order, and that the plaintiff might on this have indorsed it over to

Acheson v. Fountain, Mich. 9 G. I. B. R. 1 Str. 457, cited 2 Bur. 1223.

another, who would have been the proper order of the first indorser.

YET, notwithstanding these cases, the same point was again agitated on the following occasion :

Edie v.
East-India
Company, 2
Bur. 1216.
1 Bl. Rep.
295.

COLONEL CLIVE drew a bill, payable to Mr. Cambell, or order, on the East-India company, who accepted it ; Mr. Cambell indorsed it to Mr. Robert Ogilby, but the words "or order" being originally omitted, were afterwards inserted by another hand before the trial : Ogilby indorsed it over to Messrs. Edie and Laird or order, and afterwards, before the payment, became insolvent : Edie and Laird brought an action against the company as acceptors, who refused payment, on pretence that Ogilby had no right to assign to the plaintiffs : the real question was, who should bear the loss, Mr. Cambell or the plaintiffs ; for the East-India company, if they did not pay to the plaintiffs, must pay to Mr. Cambell.

AT the trial, Lord Mansfield permitted the defendants to give evidence of a *usage among merchants*, that an indorsement to any individual by name, without the words "or order," destroyed the negociability of the bill, and confined the right of recovery to that individual person : this usage was proved by a number of witnesses ; but no instance was shewn where the indorsee, to whom a bill was indorsed without adding the words, "or order," ever actually lost the money, so as to put him on disputing the point. His Lordship, in his address to the jury, told them, that,

that, laying the usage out of the case, by the general law, the indorsement would follow the nature of the original bill, and be an absolute assignment to the indorsee or his order : but that he left it to them, on the particular evidence of the usage that had been laid before them : that if they found an usage so established and settled amongst merchants and traders as to be clear and plain beyond all doubt, they might find a verdict for the defendant, but that if they were doubtful of the usage, or if it appeared to them not to be fully and clearly established, or to be the other way, then they ought to find for the plaintiff.

THAT the question arose on the insolvency of Ogilby, the first indorsee ; that therefore it ought to be considered who it was that gave credit to him, for that he who gives the credit ought to run the risk : that if Mr. Cambell meant to trust Ogilby with the money, it was he who ought to suffer by him ; and that he meant to trust him was clear ; for it was acknowledged on all hands, that Ogilby himself had a right to receive it of the company, whether he had a right to indorse the bill to another person or not.

THE jury found for the defendants ; and on an application for a new trial, the counsel in support of the verdict rested principally on the usage which had been established by the evidence ; and with respect to the two cases before cited, they endeavoured to shew that they did not apply to the present ; the first, they said, must have been an indorsement in blank, not to Witherhead by name,
and

and then there could be no doubt of his power to transfer it : the second did not decide the present question, for it was only an objection on account of the declaration varying from the evidence : the plaintiff had clearly a right to recover, without entering into the general question, for she was the person to whom the bill was indorsed and had not indorsed it over ; and what the court was reported to have said, "as to her power to have indorsed it to another, who would be the proper order of the first indorser," was at least extrajudicial, if not added by the reporter himself : but the court, on full deliberation, were of opinion, that the law was settled by those two cases, that such an indorsement was good, and gave the indorsee a right of indorsing over : that the law having been so settled, no evidence of an usage to it ought to have been admitted ; that the law of merchants is the law of the kingdom, and part of the common law, and when once established by judicial determinations, cannot be shaken. Where indeed the law of merchants is doubtful, the evidence of a custom may be received ; but even then it must be proved by facts, not by opinion only, and must be consistent with the general principles of the law.

YET an indorsement may be restrictive, and then it operates to preclude the person to whom it is made from transferring the instrument to another, so as to give him a right of action, either against the person imposing the restriction, or against any of the preceding parties ; it may give a bare authority to
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the indorsee to receive the money for the indorser; as if it say, "pray pay the money to such a one for my use," or use such other expressions as necessarily import that he does not mean to transfer his interest in the bill or note, but merely to give a power of receiving the money. In such a case it would be clear that no valuable consideration had been paid; but the intention of restraint must appear on the face of the indorsement.

So, if the payee direct by indorsement that "the within must be credited to the account of a third person;" this is not a transfer of the bill to that third person, but only an authority to the drawees to give him credit for so much; the payee does not mean to make himself liable as indorser, or to enable the other to raise money on the bill. Doug. 617.
(640.)

AND, if in such a case the drawee accept the bill, instead of cancelling it, and an indorsement be forged and the bill negotiated, the party who shall advance money on it must sustain the loss; and if afterwards a friend of the drawer, by mistake, pay the bill for his honour, the drawer may recover back the money, in an action for money had and received to his use; for it was the duty of the party advancing the money on the bill to read the special indorsement, and he must suffer for his negligence.

THUS, where a bill was drawn by a house in Denmark on a house in London, payable to a person residing in Denmark, or his order, and the payee made such a special indorsement; the drawees accepted and gave notice Anchor v.
Bank of
England.
Doug. 615,
(637.)

to the drawers and to the person in whose favour the indorsement was made, that they had received the bill and placed it to the account of the latter; the clerk of the acceptors forged an indorsement to himself or order, from the person to whose account the money was to be credited, and discounted it at the bank; the acceptors failed before day of payment, and a friend of the drawers went to the bank and paid the bill for their honour: the drawers afterwards recovered back the money from the bank, on the ground that this special indorsement restrained the negotiability of the bill, and that the money was paid by mistake.

If an indorsement be made in favour of an infant, and he indorse it to another, no recovery can be had on that indorsement against the infant, because he cannot render himself liable by his contract; yet, as it is to be presumed, unless the contrary appear on the face of the indorsement, that every indorsee has given a valuable consideration, the infant's indorsement cannot be considered as such a restraint on the negotiability of the bill as to prevent the indorsee's recovery against the acceptor or drawer, or any of the other indorsers.

WHERE the transfer may be by delivery only, that transfer may be made by any person who, by any means, whether accident or theft, has obtained the possession; and any holder may recover against the drawer, acceptor or indorser in blank, if he gave a valuable consideration without knowledge of the accident.

A BANK

A BANK note for 2 l. 10 s. payable to one William Finney, or bearer, on demand, was sent by Finney, under cover by the general post to his correspondent in Oxfordshire; the mail on the same night was robbed, and this note among others taken and carried away by the robber; it afterwards came into the possession of one Miller, an innkeeper, for a full and valuable consideration, in the usual course of his business, without any notice or knowledge of its having been taken out of the mail. Finney, hearing of the robbery, applied to the bank to stop the payment of this note, which was ordered, on his entering into security to indemnify the bank. Miller afterwards presented the note for payment, and delivered it to Race, a clerk of the bank, who refused either to pay it, or to re-deliver it. Miller brought an action of trover against Race, for the recovery of the note; and a case stating these circumstances coming before the court, it was held that the plaintiff was entitled to recover; because there appeared no circumstance of collusion in him; he had taken the note in the usual course of his business, for a valuable consideration, and the currency of these notes and the nature of trade required that the fair holder should be protected even against the true owner, who could only recover them back from the finder or any other person who had given no value for them.

Miller v.
Race, 1
Bur. 452.

VAUGHAN, a merchant in London, gave to Bicknell, one of his ships husbands, a draught on his banker, Sir Charles Asgill, payable

Grant v.
Vaughan,
3 Bur. 1516.
1 Bl. Rep.
485.

payable to ship Fortune, or bearer : Bicknell lost the draught; the person who found it, or at least was in possession, however he might have obtained that possession, went four days after the note was payable, to the shop of Grant, a tradesman at Portsmouth, and having bought some tea, gave him the note in payment, and desired to have the balance. Grant stepped out to make inquiry who Vaughan might be, and being informed he was a responsible man, and that the note was in his hand-writing, gave the change out of the note, retaining the price of the tea. Vaughan being apprised that Bicknell had lost the note, sent notice to Sir Charles Asgill not to pay it. Payment being accordingly refused, Grant brought his action against Vaughan as the drawer. The cause was tried by a special jury of merchants, who found for the defendant. On an application for a new trial, the court held that these notes were transferable by mere delivery, and however the true owner may have lost them, the fair possessor for a valuable consideration was entitled to the money, and therefore granted a new trial.

THE same principle applies to the case of a bill negotiated with a blank indorsement.

Peacock v.
Rhodes et
al. Doug.
621. (613.)

A BILL was drawn at Halifax, by Rhodes and another, on Smith, Payne, and Smith, bankers in London, payable to William Ingham, or order, 31 days after date, for value received. Ingham indorsed it in blank; John Daltry received it from him, and indorsed it in the same manner, and delivered it to Joseph Fisher; it was stolen from Fisher at York,

York, without any indorsement by him :— Peacock, a mercer at Scarborough, afterwards received it from a man unknown, who called himself William Brown, and by that name indorsed it to Peacock, of whom he bought cloth and other articles in the way of his trade as a mercer, and gave him that bill in payment, receiving the balance in cash and small bills : it appeared that Peacock did not know the drawers, but had, several times before that, received bills drawn by them, which were duly paid. Peacock tendered this bill for acceptance and payment to the drawees, who refused ; on which he brought an action as the indorsee of Ingham against the drawers. A verdict by consent was found for the plaintiff, subject to the opinion of the Court of King's Bench, on a special case stating the preceding facts. The court held that there was no difference between a bill or note indorsed blank and one payable to bearer.— They both pass by delivery, and possession proves property in both cases. The holder of either cannot with propriety be considered as assignee of the payee. An assignee must take the thing assigned, subject to all the equity to which the original party was subject : if this rule were applied to bills and notes, it would stop their currency ; it would render it necessary for every indorsee to inquire into all the circumstances, and the manner in which the bill came to the indorser : but the law is now clearly settled, that a holder coming fairly by a bill or note, is not to be affected with the transaction between the original parties.

Vid. page
66.

parties, except in such cases as depend on particular acts of parliament.

BUT a transfer by indorsement, where that is necessary, can only be made by him who has a right to make it, and that is strictly only the payee, or the person to whom he or his indorsee has transferred it, or some one claiming in the right of some of these parties.

WHERE a bill or note is drawn in favour of two or more in partnership with one another, an indorsement by one will bind both, if the instrument concern their joint trade: so, where it is in favour of them or either of them, an indorsement by one is a sufficient transfer, though they be not in partnership.

Carvick v.
Vickery,
Doug. 630.
(653,) in the
notes.

So, where a bill drawn by two is made payable to them or their order, it would seem from principle that either might transfer without the other; for when two persons join in the same bill, they hold themselves out to the world as partners, and, for that purpose, are to be treated as such; and when a bill goes out into the world, the persons to whom it is negotiated are to collect the state and relation of the parties from the bill itself. If they appear on the bill as partners, it may be of less public detriment to subject them to the inconvenience of being treated as such, than to permit them to deny that they are so.

BUT there is a universal usage among all the bankers and merchants in London, that in such a case, an indorsement by one of the payees only is void.

IF a Bill of Exchange or Promissory Note be made or indorsed to a woman while single, and she afterwards marry, the right to indorse it over belongs to her husband, for by the marriage he is entitled to all her personal property.

Connor v. Martin, 1 Str. 516.

IF a man become bankrupt, the property of bills and notes of which he is the payee or indorsee, vests in his assignees, and the right to transfer is in them. And if in fact he indorse a bill or note after his bankruptcy, and that be discovered before it be paid, the assignees may recover it back from his indorsee in an action of trover, and if the money be received, they may recover the money in an action for so much money paid to their use.

Beawes, 469. 470.

IF he die, it devolves to his personal representatives, his executors, or administrators; and they may indorse it, and their indorsee maintain an action, in the same manner as if the indorsement had been by the testator or intestate. But on their indorsement they are liable personally to the subsequent parties, and not as executors; for they cannot charge the effects of the testator.

Rawlinson v. Stone, 3 Will. 1. 2 Str. 1260. 2 Barnes, 137, cited 2 Bur. 1225. 1 Term Rep. 487.

THEY may also be the *indorsees* of a bill or note in their quality of executors or administrators; as where they receive one from their testator or intestate, and in that character they may bring an action on it against the acceptor or any of the other parties.

King, Ex. v. Thorn 1 Term Rep. 487. Vid. also 10 Mod. 315.

WHEN a bill payable to order is expressed to be for the *use* of another person than the

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the payee, yet the right of transfer is in the payee, and his indorsee may recover against the drawer or acceptor.

Evans v.
Cramlington, East 2.
Jac. 2.
Carth. 5. 2
Vent. 309.
2 Show.
509.

ONE Cramlington drew a bill of Exchange on Rider, payable to Price or order, for the use of one Calvert. Price indorsed this bill to Evans. Rider accepted the bill, but did not pay it at the day; on which Evans, as indorsee of Price, brought his action against Cramlington, the drawer. Cramlington pleaded that Calvert, for whose use the money was to be paid, being an officer of Excise, and indebted to the king, an Exchequer process had extended in the hands of the defendant, a sum equal to that contained in the bill.

BUT the court held that Calvert had only an equitable right to have the money, and could not have maintained an action against the acceptor; and the indorsement by Price to Evans being for value received, Price had received the very money to which Calvert had an equitable title; but the sum demanded by Evans was not that sum, but another due to him for value given, in which Calvert was not concerned; and therefore the money in demand was not extendible in the hands of the defendant; and his plea of course was bad, and the plaintiff entitled to recover.

AN indorsement to the order of a person, is of the same force as an indorsement to that person or his order, and he may maintain an action on such indorsement in his own name; for among tradesmen this form is common, though

Carth. 403.

though it be intended to be made payable to the person whose order is mentioned.

BUT an indorsement by which *part* only Cath. 466. of the money is ordered to be paid, is not valid to charge the drawer or acceptor ; because by such indorsement he would be liable on one contract to as many actions as the payee or indorser should think fit.

C H A P. VII.

Engagement of the several Parties.

BY the very act of drawing a bill, a man comes under an implied engagement to the payee and to every subsequent holder fairly entitled to the possession, that the person on whom he draws is capable of binding himself by his acceptance ; that he is to be found at the place of which he is described to be, if that description be mentioned in the bill ; that if the bill be duly presented to him, he will accept it in writing on the bill itself according to its tenor ; and that he will pay it when it becomes due, if presented in proper time for that purpose.

IN default of any of these particulars, the drawer is liable to an action at the suit of any

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of the parties before-mentioned, on due diligence being exercised on their parts, not only for the payment of the original sum mentioned in the bill, but also in some cases for damages, interest and costs: and he is equally answerable whether the bill was drawn on his own account, or on that of a third person; for the holder of the bill is not to be affected by the circumstances that may exist between the drawer and another: the personal credit of the drawer being pledged for the due honour of the bill.

IF a man write his name on a blank piece of paper, and deliver it to another, with authority to draw on it a Bill of Exchange to any amount, at any distance of time, he renders himself liable to be called upon as the drawer of any bill so formed by the person to whom he has given the authority.

IF the drawee do not accept, and the holder take the steps requisite on his part, to charge the drawer, it is said the latter is bound to answer the money and damages, or give sufficient security to answer them within double the time the first bill had to run.

BY the manner in which this alternative is expressed, it would seem that the drawer is not under an absolute obligation to make immediate satisfaction, and that the other party must be contented with the latter part of it, at the pleasure of the drawer: such may be the law and custom in other countries, but it is certainly not so here; for it has often been determined, that if acceptance be refused and the bill returned, this is only notice to the drawer

Beawes
469.

Bl. Term
Rep. C. B.
313.

G. L. E.
118, 119.
cites Mol.
281.

Vid. Mar.
29.

Mitford v.
Mayor,
Doug. 55.

drawer of the refusal of the drawee ; but that the period when the debt of the former is to be considered as contracted, is the moment he draws the bill, and an action may be immediately commenced against him, though the regular time of payment, according to the tenor of the bill, be not arrived. For the drawee not having given credit, which was the ground of the contract, what the drawer had undertaken has not been performed.

ON this principle it has been held, that if a man draw a bill, and commit an act of bankruptcy, and afterwards the bill be returned for non-acceptance ; the debt is contracted before the act of bankruptcy, and may be proved under the commission, and therefore a certificate obtained on that commission will be a bar to an action on the bill, which could not have been the case if the notice of non-acceptance had been the period when the debt was contracted.

Macarty v.
Barrow, 2
Str. 949,
cited 3
Will. 16,
17.

WHEN a Bill of Exchange is indorsed by the person to whom it was made payable, as between the indorser and indorsee, it is a new Bill of Exchange ; as it is also between every subsequent indorser and indorsee ; the indorser, therefore, with respect to all the parties subsequent to him, stands in place of the drawer, being a collateral security for the acceptance and payment of the bill by the drawee : his indorsement imposes on him the same engagement that the drawing of the bill does on the drawee ; and the period when that engagement attaches is the time of the indorsement.

Thus

1 Salk. 123
2 Show.
451, 494.
Bur. 674.

Thus whatever doubts there may be as to the propriety of permitting a holder of a bill, made to a fictitious payee, to recover from the drawer or acceptor, yet no question on that subject can arise between a real indorser and a subsequent indorsee.

NOTHING will discharge the indorser from his engagement but the absolute payment of the money ; not even a judgment recovered against the drawer, or any previous indorser, as appears from the following case.

THE plaintiff, as last indorsee of a Bill of Exchange, brought an action against the last indorser, who pleaded that the plaintiff had sued and recovered against the original drawer, and that the judgment was still in force ; to this the plaintiff demurred. In favour of the defendant it was argued, that though the plaintiff might originally bring his action against either the drawer or any of the indorsers, yet, having made his election, he should not therefore be permitted to resort to the others, for that, it was said, would deprive some of them of their remedies, and election was to choose either one or the other, and not every one successively : and this case was compared to that of a trespass done by several, where the party injured, having brought his action against one, and recovered judgment, he cannot afterwards recover damages against any of the others, because the action is founded on uncertain damages, which being ascertained by the first action, cannot be brought in question again.

FOR

3 Brown
Rep. Chan.
238.
ex parte
Clarke.

Claxton v.
Smith. 3
Med. 86.
2 Show.
441, 494.
skin cr
255.

FOR the plaintiff it was argued, that as no exception was taken to the declaration, the whole question was confined to the validity of the plea. No plea can be a good bar to an action which is not in reason a good answer to the matter charged in the declaration, nor an evasion of it: the fact in this plea is no answer to the charge: the fact alleged is, that a bill was drawn and directed to be paid to the defendant; that he by indorsement ordered the contents to be paid to the plaintiff: the custom of merchants is, that he who indorses or subscribes a Bill of Exchange, and by such indorsement or subscription orders the acceptor to pay the contents to another, becomes chargeable to pay that money himself, in case the indorsee or payee do not otherwise receive it: it is here alleged that the money is not paid, and it must be agreed that such an allegation is necessary in every declaration of this kind, and had it been omitted the defendant might have demurred. Every indorser is chargeable, because he is supposed to have received the value at the time of the indorsement: the law implies that, if the indorsee had then asked the indorser, what if this bill be not paid by the drawee? the answer would have been, the drawer is a good man: but what if the drawer should fail? then I will pay you; this is as strongly implied as if it had been written in express terms: the contract of the indorser is distinct from that of the drawer, by implication of law and the custom of merchants: he is as a collateral security, that, if the acceptor or the drawer do

not pay the money, he will : the greater number of indorsers, the better is the bill esteemed, if before the day of payment, because every name is an additional security, and the indorsee as frequently receives it on the credit of the indorser, as on that of the drawer or acceptor.

As it is necessary for the plaintiff to allege the non-payment of the money, in order to charge the defendant ; so to discharge himself, the latter must shew that it has been paid ; for the nature of his undertaking is such that if the acceptor do not pay it at the day, or afterwards satisfaction be made by somebody, he will see it paid : but what is the defence set up here ? it amounts to no more than this ; you have sued the drawer, and recovered a judgment against him, and he has not paid you, therefore *I* will not pay you ; the drawer was bound to pay you as well as *I* ; if the acceptor did not, therefore as he has not paid you, so neither will *I* : every indorsement being a new bill, has two effects ; it transfers to the indorsee the indorser's right of action against the drawer and acceptor ; and it creates an obligation on the indorser, that the indorsee shall be satisfied : can a recovery then against the drawer, without satisfaction, discharge that engagement ?

THIS case differs in two very material points from the case of trespass : in trespass the action may be brought jointly against all the trespassers ; but here the undertakings of the drawer and indorser are distinct, and a joint

joint action cannot be brought against them both : again, trover and trespass are founded on a wrong, and the damages are uncertain ; and when they are reduced to a certainty by the verdict and judgment, they are changed into another nature from an action for a wrong to an action for a right, and the plaintiff cannot resort back to any of the other parties to demand the uncertainty again : but this is an action founded on a right, and the recovery against one does not alter the nature of the claim against the other : the damages are certain, and the contract several ; and there is an exact resemblance between this case and that of two obligors in a bond : their judgment against one is not pleadable to an action against the other ; nothing less than satisfaction will discharge the debt ; because the undertaking is several, each being bound for the payment.

THE same reason holds in this case ; by the plaintiff's judgment against the drawer, the defendant's promise or contract is not changed, but his undertaking to see the debt paid still continues.

As to his having made his election, that doctrine does not apply here ; this is not like the case of a man having two remedies to enforce the performance of one contract, as in the case of rent, where the landlord has two remedies, an action and distress, and after he has chosen to pursue one method he is barred from the other : but here there are not different remedies on the same contract, but the same remedy on several distinct contracts :
for

for the drawer, acceptor, and indorser, are all chargeable on their several contracts: would this plea be good in the mouth of the acceptor? it cannot be pretended that it would, for his contract is of quite a different nature from that of the drawer; and that of the indorser is as distinct as that.

THE great objection is, that we have inverted the course of proceedings, and deprived some of the parties of their remedies, if we should be admitted to resort back to the indorser; but it is conceived the case is otherwise; for the judgment against the drawer will not be pleadable against the defendant, if he sue him after he has paid us; we have rather pursued the right method in suing the first obligor, the drawer, and not finding satisfaction from him we resort to the defendant.

NOTWITHSTANDING these arguments in favour of the plaintiff, judgment was given for the defendant; but it was afterwards reversed in the Exchequer chamber.

NEITHER is the engagement of an indorser discharged by an ineffectual *execution* against the drawer or any prior or subsequent indorser.

A BILL was indorsed by Sheridan, and afterwards by one Boon, and came into the hands of Hayling, who sued Boon, and took him in execution, and afterwards let him out on a letter of license without paying the debt. He then sued Sheridan, and held him to bail: Sheridan not paying the bill, Hayling brought a third action against Mulhall, one of the bail, who insisted that the debt was satisfied by

by the imprisonment of Boon. But it was observed by the court, that each indorser is independent of the rest, and that the bill-holder had a right to sue all the indorsers till the bill was satisfied : the law indeed so highly regards the liberty of the subject, that the taking of his body in execution is, with respect to him, a full satisfaction of the debt.— But it only operates as a discharge to the identical person so imprisoned ; it does not discharge even his goods after his death, since the statute of James the first. The remedy still remains, after the death or discharge, against every other indorser.

ON a Promissory Note, the engagement of the payee and other indorsers is similar to that of the drawer, payee, and indorsers of a Bill of Exchange, as far as that engagement can apply, which is for payment only ; the acceptance being already made by the bare issuing of the note.

THE engagement of the drawer and indorsers is however still but conditional : in order to entitle himself to call upon them in consequence of it, the holder undertakes to perform certain requisites on his part, a failure in which precludes him from his remedy against them.

WHERE the payment of a bill is limited at a certain time after sight, it is evident the holder must present it for acceptance, otherwise the time of payment would never come : it does not appear, however, that any precise time, within which this presentment must be made, has in any case been ascertained : but it must be done as soon as, under all the circumstances of the case, that can conveniently be

be done; and all that has been said on the presentment of Bills and Notes payable on demand, seems exactly to apply here, that which might be construed as unnecessary delay in the one case, having evidently the same tendency to produce inconvenience or loss to the preceding parties in the other.

Vid. Mar.

12.

WHETHER the holder of a bill, payable at a certain time after the date, be bound to present for acceptance immediately on the receipt of it, or whether he may wait till it become due, and then present it for payment, is a question which seems never to have had a direct judicial determination: in practice however it frequently happens that a bill is negotiated and transferred through many hands without acceptance, and not presented to the drawee till the time of payment, and no objection ever made on that account.

Vid. 5 Bur.

2671. 1

Term Rep.

713.

WHERE indeed a bill is remitted to a factor or agent, to procure acceptance, for the benefit of his principal, it is the duty of the factor to use all diligence to have it accepted, and to give advice to his principal of the event; that he may take the proper steps in case of non-acceptance; and the factor may be liable to make good any loss to his principal arising from his negligence: but this does not affect the bill itself, nor the right of the principal on it.

Mar. 12, 13.

Beawes, 454.

IF, however, the holder in fact present the bill for acceptance, and that be refused, he is bound to give regular notice to all the preceding

Blesard and

Hirst, 5

Bur. 2670.

Goodall v.

Dolley, 1

Term Rep.

712.

ceding parties to whom he intends to resort for non-payment; to the drawer, that he may know how to regulate his conduct with respect to the drawee, and make other provision for the payment of the bill; and to the indorsers, that they may severally have their remedy in time against the parties on whom they have a right to call: and if, on account of his delay, any loss accrue by the failure of any of the preceding parties, *he* must bear the loss.

THUS, if in the mean time the drawer fail, the holder cannot call on the payee indorser, because *he* can have no remedy against the drawer. Blesard v.
Hirst, 5
Bur. 2670.

So, also, if the drawee fail, the holder cannot recover against either the drawer or indorser, because, if he could, a loss must fall on one of them, as the drawer can have no remedy against the drawee. Goodall v.
Dolley,
1 Term
Rep. 712.

NOR will it make any difference, though the indorser, from an ignorance of the law, thinking himself bound to make good the money, promise afterwards to take up the bill at some future time. 5 Bur. 2670.

MUCH less can the indorser be bound by a proposal to discharge the bill by instalments, made after the return of the bill for non-payment, under an ignorance of acceptance being refused; more especially if that proposal be rejected by the indorsee. 1 Term
Rep. 712.

If an acceptance varying from the tenor of the bill be offered by the drawee, the holder acquiescing must send the same notice to the preceding parties, as if acceptance were refused, Mar. 17.

refused, otherwise he cannot have recourse to them; for to admit of such acceptance without notice is to give credit to the acceptor.

It is also the duty of the holder of a bill, whether accepted or not, to present it for payment within a limited time; for otherwise the law will imply that payment has been had, and it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when all accounts might be adjusted between him and the drawee. But so little was it understood at the beginning of this century within what time payment was to be demanded, that cases are reported of actions brought against the drawer several years after the bills were due, and without demand from the drawee. There is also a difference in the terms in which the time for presentment is prescribed by the judges: in one case it is said, that with respect to foreign bills the drawee has three days to pay them, and no demand needs be made till the *expiration* of the three days, and if within that time he fail, the indorser is chargeable, and after the *expiration* of the three days the indorsee may take the steps necessary to entitle him to his remedy against the preceding parties: but in another place it is laid down that the time of payment is the last of the three days, and on that the money must be demanded; and if the last be Sunday or a great holiday, the demand must be made on the second. The last is the rule adopted now. But it has been made a question, whether the demand may
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Allen v.
Dockwra, 1
Salk. 127.
Darrack v.
Savage, 1
Show. 155.

Hill v.
Lewis, at
N. P. 1
Salk.
132, 133.

Taffel v.
Lewis, 1
Ld. Raym.
743.
Coleman v.
Sayer, 2
Str. 329.
Vid.
Beawes,
461.

be made at any time on the last of the days of grace ; or, whether the holder be bound to wait till the last moment of the day ? On one side it has been said,* That, in analogy to the rule with respect to the time when rent is payable, the acceptor had till the last moment of the day : but, on the other side, it was well answered, † That the rule, as to the time of paying rent, or that adopted in other similar cases, could not apply to this ; that the undertaking of the acceptor was, to pay the bill *on demand, on any part of the third day of grace* ; that this rule was now so well established, that it would be extremely dangerous to depart from it. That with regard to foreign bills, all the books agreed that the protest must be made *on* the last day of grace, which supposed a default in payment, as a protest could not exist till default was made ; but if the party had till the last moment of the day to pay the bill, the protest could not be made on that day. The usage, therefore, was established, that Bills of Exchange are payable at any time on the last day of grace on demand, provided that demand be made within reasonable hours.

In practice the three days of grace have usually been allowed on Promissory Notes ; but it was not till very lately that the propriety of this practice was established by a judicial determination. The first notice we find taken of this point is in a short note of a case, in which it is said to have been determined,

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mined,

* By Lord Kenyon, in the case of *Lestley v. Mills*, Term Rep. 173.

† By Buller J. *id.* 174.

May v.
Cooper,
Fort. 376.

mined, that the three days were *not* to be allowed; and, from the examination of the record, it appears to have come before the court on demurrer.

Defaux v.
Hood, at
Guildall.
Bul. N. P.
274.
Ward v.
Honey-
wood,
Doug. 61,
63.

IN a subsequent case Mr. Justice Dennison is said to have ruled that they were not to be allowed, but that case is mentioned with a quere. In another, where the question was, whether the action was not commenced before the cause of action accrued, Mr. Justice Buller is reported to have said, that he doubted whether the allowance was to be made; but as it appeared that, independently of the three days, the action had been commenced too soon, the point was not generally considered. In a subsequent case, this point was incidentally mentioned. That was an action on the statute of usury, in which the plaintiff declared, on a contract, to forbear for four calendar months and three days. The evidence was a Promissory Note payable at four months from the date, and it was objected for the defendant that this was a variance. But Lord Mansfield observing that in a computation of interest made by the defendant himself, and which was in evidence, the three days of grace were allowed, he thought this decisive against him, without determining the general question.

Lloyd v.
Skutt, M.
20 G. III.
Doug. 63,
in the
notes.

ON principle there seems little reason why the three days of grace should not be allowed. They were originally allowed on Bills of Exchange by custom established by the universal consent of merchants. The statute of Queen Anne, which was made to put
Promissory

Promissory Notes on the same footing with Bills of Exchange, does not certainly in express terms say that, in this respect, they shall be considered in the same light, for then there could be no doubt; but it renders them negotiable in the *same* manner, and gives the *same* remedy to the possessor: and it is fair to presume it was intended, that, as far as the nature of them admitted a comparison with Bills of Exchange, they should have the same incidents. The general practice ever since the statute has been to make the allowance; every man who makes a Promissory Note does it under the conviction that he is not to be called upon for payment till the third day, or if that be a Sunday or a great holiday, till the second: he who takes the note, and every other possessor, respectively, purchases it under the opinion that they have no right to call on the drawer till that time.

IN a case, in which the principal question was, whether the indorsee of a Promissory Note had given due notice to the indorser of its having been dishonoured by the maker, the course of argument proceeded on the supposition that the three days grace were allowable; that case was argued three several times in the Court of King's Bench, and afterwards in the Exchequer Chamber: but the present question was not even raised, and it was taken for granted in all the different stages of that cause, that the negligence of the holder did not commence until the expiration of the three days grace; for if that had not been admitted

Tindal vs
Brown,
1 Term
Rep. 167.

admitted on both sides, no question at all could have arisen, as, if they were not to be allowed, there would indisputably have been negligence in the holder.

Brown v.
Harraden,
4 Term
Rep. 148.

IN a late case, in which this point has been finally settled in favour of the allowance of the three days, the declaration stated a note drawn by one W. Gurman, on the 15th of September, 1789, for 20l. payable to the defendant, or order, on the 2d of November; it then deduced a title to the plaintiff, and averred a refusal to pay, by the defendant, on the 2d of November. The defendant pleaded a tender on the 5th of November. The plaintiff replied, that he sued out a bill of Middlesex, on the 4th of November, and that the defendant did not at any time, before that day, tender the 20l. The rejoinder was, that the bill of Middlesex was sued out on the 4th of November, and that before that time the defendant was not, by force of the statute, liable to pay. The surrejoinder, that he did become liable, by force of the statute, before the suing out of the bill of Middlesex; to this there was a demurrer; and the question was, whether the defendant was not entitled to the three days of grace?

May v.
Cooper,
For. 376,
vid. page
122.

IN favour of the plaintiff were cited the case above-mentioned, which had directly decided the point, and a great many others, which seemed to favour the same opinion; but to these one short answer was given, that they were decided at a time when the subject was not well understood, and were therefore

no authority; and judgment was given in favour of the defendant, on reasons similar to those above suggested. It was also observed, that it had been uniformly the custom of the Bank of England, the bankers, and the principal merchants in the city, to make allowance for the three days in discounting these notes; and that if they were not to be allowed, that practice must be illegal, and they must all have incurred the penalties of usury. It was further observed, that numberless questions would arise on notes, which had been paid by indorsers, in default of payment by the makers; on the ground that the holders had not used due diligence.

A PRESENTMENT either for payment or acceptance must be made at seasonable hours: and seasonable hours are the common hours of business in the place where the party lives: to whom the presentment is to be made.

If acceptance or payment be refused, or the drawee of the bill or maker of the note has become insolvent, or has absconded, the holder must give notice to the preceding parties; and in that notice it is not enough to say that the drawee or maker refuses, is insolvent, or has absconded; but it must be added, that the holder does not intend to give him credit. The purpose of giving notice is not merely that the indorser should know that default has been made, for he is chargeable only in a secondary degree; but to render him liable, it must be shewn that the holder looked to him

As to Bills,
vid. 1 Str.
441, 515.
Dagglisb-v.
Weatherby
2 Bl. Rep.
747. As to
Notes, vid.
1 Str. 649.
2 Str. 1087.
Tindal v.
Brown, 1.
Term Rep.
170.

for payment, and gave him notice that he did so. A case might easily be imagined, where the indorser might have notice from the holder, and yet would not be liable; as if that notice contained circumstances which shewed that the indorsee had given time and credit to the acceptor or maker.

IT is therefore necessary that notice should come from the indorsee himself: it is not sufficient that the indorser should be informed by some third person, as by the drawee or maker, that he does not choose to accept, or cannot pay.

WHAT should be considered as a reasonable time, within which notice should be given either of non-acceptance or non-payment, has been subject to much doubt and uncertainty: it was once held that a fortnight was a reasonable time, but that is now much narrowed.

WITH respect to acceptance, it is usual to leave a bill for that purpose with the drawee till the next day, and that is not considered as giving him time; it being understood to be the usual practice: but if, on being called on the next day, he delay or refuse to accept according to the tenor of the bill, the rule now established, where the parties, to whom notice is to be given, reside at a different place from the holder and drawee, is, that notice must be sent by the next post. Under the same circumstances, the same rule obtains in the case of non-payment.

So,

So, also, in case the drawee or maker has absconded, or cannot be found, notice of these circumstances, either in case of non-acceptance or non-payment, must be sent by the first post.

BUT the great difficulty has been to establish any general rule, where the party entitled to notice resides in the same place, or at a place at a small distance from that in which the holder lives. On this point, as well as on the question of what shall be considered as a reasonable time for making the *demand* of payment, it has been an object of no little controversy, whether it was the province of the jury or of the judge to decide: till lately, it seems the jury had been permitted to determine on the particular circumstances of each individual case what time was reasonably to be allowed, either for making demand or giving notice.

Vid. the cases at the end of Chap. III. and Doug. 515. 683.

BUT it having been found that this was productive of endless uncertainty and inconvenience, the court on several occasions have laid it down as a principle, that what shall be considered as a reasonable time in either case is a question of law: juries have however struggled so hard to maintain their privilege in this respect, that in two cases they have narrowed the time for demand, contrary to the opinion of the court; and on a second trial being granted, have in both cases adhered to their opinion, contrary to the direction of the judge. In one of them, however, an application being made for a third trial, the court would have granted it, had not the plaintiff

Metcalf v. Hall, B. R. T. 22 G. III cited Doug. 515. & 1 Term Rep. 171. Appleton v. Sweetapple. B. R. M. 23 G. III. cited Doug. 515.

plaintiff precluded himself by proving his debt under a commission of bankrupt which had issued against the drawees of the bill between the time of the verdict and the application.

1 Term Rep.
169. Tindal
v. Brown, 1
Term Rep.
167.

IN a third case, where the struggle by the jury was to give a longer time for notice than was necessary, the court adhered to their principle, and granted no less than three trials.

THIS case was an action by the indorsees of a Promissory Note against the indorser.— The circumstances were these: on the 21st of August, 1784, the note in question was made by one Donaldson for 35l. payable six weeks after date; on the fifth of October, 1784, the day on which the note became due, allowing for the three days of grace, Howell, the plaintiff's clerk, called at Donaldson's at ten in the morning, and, not finding him at home, he left word that the note was due, and desired Donaldson would send for it at his master's, where it lay, and take it up; on the next day, the sixth of October, he called again at Donaldson's, who told him he would take it up that day within the banking hours, which were from nine to four o'clock; the note not being taken up that day, he called again on Donaldson on the seventh, and not finding him at home, he was sent to the defendant to tender the note, who refused to pay it, saying, the plaintiffs had made it their own. Donaldson proved at the trial, that immediately on his parting with Howell on the sixth, he went to the defendant's house, and, not finding him at home, left a message with his wife that the
note

note was due ; that he, Donaldson, could not pay it, but that if the defendant would take it up, he would make it good to him.

IT appeared that all the parties lived at Bristol, within twenty minutes walk of each other.

ON the first trial the jury gave a verdict for the plaintiffs. On an application for a new trial, the court held that the bill had been dishonoured on the fifth, and that notice to the indorser should have been given the same day ; that by not giving it then, the holder had given credit to the maker and discharged the indorser, and therefore they granted a new trial, on the ground that the jury had taken upon them to decide on matter of law : on the second trial the jury gave a similar verdict, and a third trial was granted. It seems therefore fully established that what shall be reasonable time is a question of law : but it seems almost impossible to fix any other rule than this, that demand must be made, and notice given, as soon as, under all the circumstances it is possible so to do.

THE reason why the law requires notice : *Term Rep.*
is, that it is presumed that the bill is drawn ^{410.}
on account of the drawee's having effects of the drawer in his hands ; and that if the latter has notice that the bill is not accepted, or not paid, he may withdraw them immediately. But if he have no effects in the other's hands, then he cannot be injured for want of notice, and if it be proved on the part of the plaintiff, that, from the time the bill was drawn, till the time it became due, the drawee never had any effects

effects of the drawer in his hands, notice to the latter is not necessary in order to charge him, for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice, that it has been dishonoured.

Bickerdike
v Bollman
1 Term Rep.
405.

A QUESTION arising on the validity of a commission of bankrupt on account of the insufficiency of the debt due to the petitioning creditor, the facts appeared to be these: the bankrupt being indebted to the petitioning creditors in the sum of 115l. 3s. 8d. on the 15th of September, 1784, drew a bill for 20l. on the defendant, "who, till the time of the bankruptcy and of the bill becoming due, was a creditor of the bankrupt," payable to the petitioning creditors, two months after date, and paid it to them on account of part of their debt: the bill was presented for payment on the 18th of November following, and dishonoured. No notice however was ever given by the petitioning creditors to the bankrupt, or left at his house; a commission issued against the drawer on the 20th of November, on which he was declared a bankrupt in the afternoon of the 24th; that commission was afterwards superseded, and another commission was issued on the petition of the parties, on the amount of whose debt the present question arose. If the petitioning creditors, by not giving notice to the bankrupt of his bill being dishonoured, had made the

the bill their own, their debt was reduced within 100l. and then the commission could not be supported; but if notice was not necessary, the bill was not payment; their debt remained as it originally was, and the commission was valid. On the principles before stated, the court held that notice in this case was not necessary, and therefore the commission was good.

YET though it appear that the drawer had no effects in the hands of the drawee, no action can be maintained against the *indorser* if no notice was given him of the bill being dishonoured; for though the drawer may have received no injury, the indorser, who must be presumed to have paid a valuable consideration for the bill, probably has. 1 Term Rep. 714.

THOUGH in the case where the drawer has effects in the hands of the drawee, the want of notice cannot be waved by a subsequent promise by him to discharge the bill; yet where he had no effects, it may; though it appears that in fact he sustained an injury for want of such notice: such a subsequent promise is an acknowledgment that he had no right to draw on the drawee, and if he has in fact sustained damage, it is his own fault. Rogers v. Stephens, 2 Term Rep. 713.

BUT where damage in such a case has been sustained, and no subsequent promise appears, it may be very doubtful whether want of notice can be waved.

STEPHENS, residing at Newfoundland, drew a bill in favour of Rogers on Birbeck and Blake in London, value received for the use of William Calvert at Liverpool; Rogers presented Rogers v. Stephens, 2 Term Rep. 714.

presented the bill for acceptance, was refused, and afterwards for payment, which was also refused; but he sent no notice to the drawer of the refusal to accept: he afterwards brought an action against Stephens as the drawer, at the trial of which the defence set up was the want of notice of non-acceptance, which was rebutted by shewing that the drawee never had any effects of the drawer in his hands, and by a subsequent promise appearing of the drawer to the plaintiff's agent; on which account a verdict, by the judge, was given for the plaintiff.

Lord Ken-
yon.

ON an application for a new trial, the defendant's counsel stated, that, in addition to the above circumstances, they had evidence to shew that the defendant really had been injured for want of notice; that they thought such evidence had been offered and refused, and that his lordship had given his opinion on an admission of its truth: but his lordship said he had no note or recollection of any evidence of that kind having been tendered. The circumstances were these: the defendant and Calvert had had dealings together previous to the departure of the former for Newfoundland, and he had a right to draw on Calvert at the time when the bill was drawn, having advanced money on his account to the amount of the bill. Under these circumstances Calvert had directed the defendant to draw on Birbeck and Blake as his agents, instead of drawing on him. The defendant accordingly drew the bill, on a supposition that Calvert really had effects in their hands

to answer it. It turned out however that he had none, but that was not known to the defendant; who, on his return to England, relying on his bill having been duly honoured as he had had no notice to the contrary, had settled his accounts with Calvert, and had delivered up to him goods and effects which he held in his hands of greater value than the amount of the bill; and that Calvert had since become insolvent.

REASONING on these facts, the counsel for the defendant contended that the principle, on which it had been held that no notice was necessary to be given to the drawer of the non-acceptance of his bill when he had no effects in the hands of the drawee, was decisive that it ought to have been given in the present case. Beside the presumption of fraud against a man who draws a bill on another, who, he knows, has no effects to answer it, one of the principal grounds assigned by the court for their opinion was, that no injury could arise to the drawer for want of notice. That reason therefore could not apply, where the drawer acted fairly and had actually sustained an injury for want of notice. That case too is an exception to the general rule; nothing is better established than that the holder of a Bill of Exchange, of which acceptance is refused, is in general bound to give notice of such refusal, to the drawer; if from any collateral circumstances he take upon himself to withhold it, he acts at his peril. If it appear that the drawer could receive no in-

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jury from the want of it, he is indemnified by the event; but still he is guilty of neglect, the consequences of which to him are only avoided by that circumstance. The very form of this bill was sufficient notice to the holder that it was to be paid out of Calvert's effects; for it is said to be for his use. So that there was more reason than usual to imagine that want of notice might be prejudicial to the defendant. Considering the question even in a general point of view, it would be highly detrimental to commerce, if it were to be laid down as a general rule without exception, that the objection arising from want of notice in these cases might be done away by shewing that the drawee had no effects of the drawer in his hands at the time. Nothing is more common than for merchants abroad, who are about to ship goods to their consignees or factors in England, to draw Bills of Exchange on them, before the goods come into their hands; in which cases, the most material injury might arise to those traders from want of notice that the bills had not been accepted, since they might be deprived by that means of the opportunity of stopping their goods in their way.

To this it was answered, that admitting the full force of the evidence before stated, it could not vary this case; for that as between these parties, it was not necessary for the holder of a bill to look to any other persons than those who are liable on the face of the bill itself. He cannot enter into the particular grounds which induce the drawer to draw

draw the bill, or the drawee to refuse his acceptance; it would lead to endless uncertainty if he were bound to do so. If one man choose to draw a bill, having no funds of his own in the hands of the drawee, but relying on the casualty of the stock of another who has misled him, he has his remedy against that person, but that makes no alteration in the law relative to the holder of such a bill. The rule of law is clear, and operates with a double aspect in this case; for supposing the plaintiff was bound to take notice that this was in reality the bill of Calvert, and not of the defendant Stephens, which it purports to be, still the rule would apply against the latter, for it appears that Calvert himself had no effects in the hands of the drawees.

So much of this reasoning, however, as applies to the particular case, appears fallacious, for the real question was not whether Calvert himself could have drawn on the present drawees, but whether the defendant, having a clear right to draw on Calvert, and being directed by him to draw on his agents, not knowing that they had no effects of Calvert's, was entitled to notice from the holder of his bill being dishonoured.

BUT on this occasion, the court did not think proper to decide on the general question; first, because the circumstances here mentioned did not appear to have been offered in evidence at the trial; and secondly, because if they had, whatever might have been the effect of them in favour of the defendant, he had precluded himself from taking advantage

tage of it by his subsequent promise to discharge the bill.

1 Term Rep.
170.

IN the manner in which notice either of non-acceptance or non-payment is given, there is a remarkable difference between inland and foreign bills: in the former, no particular form of words is necessary to entitle the holder to recover against the drawer or indorsers, the amount of the bill on failure of the drawee or acceptor; it is sufficient if it appear that the holder means to give no credit to the latter, but to hold the former to their responsibility.

Mal. 264.
Mar. 16.

BUT in foreign bills other formalities are required: if the person to whom the bill is addressed, on presentment, will not accept it, the holder is to carry it to a person vested with a public character, who is to go to the drawee and demand acceptance in the same manner as before, and if he then refuse, the officer is there to make a minute on the bill itself, consisting of his initials, the month, the day, and the year, with his charges for minuting. He must afterwards draw up a solemn declaration, that the bill has been presented for acceptance, which was refused, and that the holder intends to recover all damages which he, or the deliverer of the money to the drawer, or any other, may sustain on account of the non-acceptance: the minute is in common language termed the noting of the bill, the solemn declaration the protest, and the person whose office it is to do these acts a public notary: and to his protestation all foreign courts give credit.

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IN making a protest, therefore, there are three things to be done ;—the noting, demanding, and drawing up the protest :—But the noting is unknown in the law, as distinguished from the protest ; it is merely a preliminary step, and has grown into practice only in modern times. The party making the demand must have authority to receive the money, and in case that be refused, the drawing up of the protest is mere matter of form, the demand being the material part : The demand of payment of a *foreign* bill must be made by the notary public himself, and not by his clerk ; and even in the case of an *inland* bill, it is doubtful whether the demand, as the foundation of the protest made in consequence of the statute hereafter mentioned, can be made by the notary's clerk or by any other than the notary himself.

Lestley v. Mills,
4 Term Rep.
170.

THIS protest must be made within the regular hours of business, and in sufficient time to have it sent to the holder's correspondent by the very next post after acceptance refused ; for if it be not sent by that time, with a letter of advice, the holder will be construed to have discharged the drawer and the other parties entitled to notice : and noting alone is not sufficient ; there must absolutely be a protest to render the preceding parties liable.

Goofrey v. Mead, Bull.
N. P. 271.
2 Term Rep.
713.

BUT in this case the holder is not to send the bill itself to his correspondent ; he must retain it, in order to demand payment of the drawee when it becomes due.

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Beaver, 460.

WHEN the bill becomes due, whether it was accepted or not, it is again to be presented for payment within the days of grace, and if payment be refused, it must be ~~presented~~ *protested* for non-payment, and the bill itself, together with the protest, sent to the holder's correspondent, unless he shall be ordered by him to retain the bill, with a prospect of obtaining its discharge from the acceptor.

Beaver, 461.

FOR no drawer or indorser is bound to make restitution on sight of the protest alone; nor, where one of the set has been accepted; on sight of the protest and unaccepted bill, but he must give satisfactory security to the remitter on his producing the protest only, to make payment when that and the accepted bill shall be presented.

Mal. 265.

WHERE the drawee cannot be found at the place mentioned in the bill, or has absconded, protest is to be made for non-acceptance in the same manner as if acceptance had been refused on presentment.

Mar. 17, 18.

SO also, if the drawee offer an acceptance differing from the tenor of the bill, and the holder be inclined to admit it without giving up his claim on the other parties, he must protest it for that cause; as if the drawee offer an acceptance for part, the holder may permit him to accept it in that way; but he must cause it to be protested for non-acceptance of the whole, and send the protest to his correspondent, that he may endeavour to procure security for the remaining sum. When the bill becomes due, the holder must present it
for

for payment, and may receive the sum for which it was accepted, and write a receipt for so much on the bill ; but he must protest it for non-payment of the rest, and send back the protest with the bill.

BESIDE the protest for non-acceptance, and non-payment, there may also be a protest for better security ; this is usual, when a merchant, who has accepted a bill, happens to become insolvent, or is publicly reported to have failed in his credit, or absents himself from 'Change before the bill he has accepted has become due, or when the holder has any reason to suppose it will not be paid : in such cases he may cause a notary to demand better security, and on that being refused, make protest for want of it ; which protest must, as in other cases, be sent away by the next post, that the remitter or drawer may take the proper means to procure better security.

Mar. 27.
1 Lord
Raym. 743.

WHERE the original bill is lost, and another cannot be had of the drawer, a protest may be made on a copy, especially where the refusal of payment is not for want of the original bill, but merely for another cause.

A. DREW a first and second Bill of Exchange, payable by himself in Dublin, to B. or order, for value received of him. B. after the bill was due, negociated it with the plaintiff. The plaintiff on the same day indorsed it to D. living in Dublin, in these words, " Pay to D. value on my account." The first of these bills was at the same time sent away to D. and was lost on the way, and the drawer being

Dehors v.
Harriott, 1
Show. 164.

being gone to Ireland, no third bill could be had, and lest the second should miscarry as well as the first, an exact copy of the second bill was sent to D. and demand of payment being made, it was refused, because the money had been attached in the hands of the party who was to pay the bill; the protest was made on the copy, and at the trial the original second bill, along with the protest on the copy, was produced and held good.

THE effect of protest for non-acceptance or non-payment is to charge the drawer or indorsers, not only with the payment of the principal sum, but with damages, interest, and costs; but where the bill is accepted, it is so far from discharging the acceptor, that it renders him liable to refund every loss sustained by his non-payment. Here however it must be observed, that the costs mentioned to be given by the protest, are not costs of suit, but other expenses incurred: costs of suit, where the suit may be without protest, are of course given.

BESIDE the interest and costs, the damages, incurred by non-acceptance or non-payment, consist usually of the exchange, re-exchange, provision, and postage, together with the expenses of protest. The exchange is reckoned according to the course at sight, at that time and place where the protest is made, to the place where the payment should be made by the drawer; but if payment be not made there, then the sum is again increased, by the addition of commission and postage; and the course of exchange is now reckoned on

Mar. 13,
84.

Beaver,
461.

on the whole sum, according as it obtains at that time and place, on sight to the place where the bill is paid ; and the acceptor must pay the re-exchange and all charges, although the parcel was not effectually negotiated and redrawn, that is, re-exchange, provision, and postage must be twice paid, &c. as provision twice for the exchange and re-exchange ; the charges being only for postage and protests, unless the acceptor, by delays and excuses, force the holder on some necessary charges to recover, which the acceptor is obliged to pay ; but no extraordinary ones, such as travelling, will be allowed. And if the acceptor under the before mentioned circumstances refuse immediate payment to the returned bill, a legal interest may be charged him, from the day the bill was due to the time of its discharge ; though he shall not be obliged to make good any other loss or damage which the possessor may pretend he has sustained from want of punctual payment, by being frustrated in his designs of entering into some beneficial engagement, or the loss of a convenient opportunity of advantageously employing the sum detained.

Str. 649.

Beaves, 46r.

WHEREVER interest is allowed, and a new action cannot be brought for it, which is the case on Bills of Exchange and Promissory Notes, the interest is to be calculated up to the time of signing final judgment.

2 Bur.
1086, 1087.

WHERE a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expenses,

Anriol v.
Thomas,
2 Term Rep.
52.

expenses, beyond the amount of 5 per cent. if such charges be reasonable, warranted by usage, and not made a colour for usury : thus the constant course has been with respect to bills returned, protested, from India, to allow 10s. per pagoda, which includes interest, exchange and all other charges : and this notwithstanding the current price of exchange at which the bill was discounted, may have been greatly below 10s. as at 6s. 6d. and the indorsee will also be entitled to interest at 5 per cent. from a reasonable time after notice given to the indorser of the bill having been returned unpaid.

THE principal difference between foreign and inland Bills of Exchange, at common law, seems to have been this. A protest for non-acceptance or non payment of a foreign bill was, as it still is, essentially necessary to charge the drawer on the default of the drawee ; nothing, not even the principal sum, could, or can at this time, be recovered against him without a protest : no other form of notice having been admitted by the custom of merchants as sufficient. But inland bills having been introduced at a late period, in imitation of foreign ones, did not immediately adopt all their incidents : simple notice, within a reasonable time of the default of the drawee, was held sufficient to charge the drawer ; but it does not appear that in any instance they were favoured with the solemnity of a protest : the disadvantage arising from thence was this, that notice entitled the holder to recover only the sum in the original bill, which
in

in many cases might be a very serious disadvantage : to remedy this inconvenience in some degree, it was enacted " that after the twentieth of June, 1698, all and every Bill or Bills of Exchange drawn in, or dated at and from, any trading city or town, or any other place in the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, of the sum of 5l. sterling or upwards, on any person or persons of, or in London, or any other trading city, town, or any other place, *in which said Bill or Bills of Exchange shall be expressed the said value to be received,* and is and shall be drawn payable at a certain number of days, weeks, or months after date thereof, that form and after presentation and acceptance of the said Bill or Bills of Exchange, *which acceptance shall be by underwriting the same under the party's hand so accepting,* and after the expiration of three days after the said bill or bills shall become due, the party to whom the said bill or bills are made payable, his servant, agent or assigns, may and shall cause the said bill or bills to be protested by a notary public, and in default of such notary public, by any other substantial person of the city, town, or place, in the presence of two or more credible witnesses, refusal or neglect being first made of due payment of the same : which protest shall be made and written under a fair written copy of the said Bill of Exchange, in the words or form following :

KNOW

KNOW all men, that I A. B. on the
 day of _____ at the usual place of
 abode of the said _____ have demanded
 payment of the bill, of which the above is a
 copy, which the said _____ did not
 pay, wherefore I the said _____ do
 hereby protest the said bill. Dated this
 day of _____

WHICH protest so made, shall within *fourteen* days after the making thereof, be sent; or *otherwise* due notice shall be given, to the party *from whom* the said bill or bills were received, who is, on producing such protest, to repay the said bill or bills, together with all interest and charges, from the day such bill or bills were protested; for which protest shall be paid a sum not exceeding the sum of sixpence; and in default or neglect of such protest made and sent, or due notice given within the days before limited, *the person so failing or neglecting thereof, is and shall be liable to all costs, damages, and interest, which do and shall accrue thereby.*"

Harris v.
 Benson,
 2 Str. 910.

IN an action against the drawer of an inland bill after an acceptance, no interest will be allowed on this statute, without a protest.

BUT this statute only giving the protest in cases where the acceptance was by writing on the bill, persons on whom bills were drawn, knowing that ultimately the damages arising
 on

on the protest for non-payment, must fall on themselves, refused to accept in that form, and would give only a verbal promise, which rendered the provisions of the act perfectly nugatory: in order to remedy this inconvenience, it was enacted by a subsequent statute, "that from and after the first of May, 1705, ^{3 & 4 Ann} in case, upon presenting any such Bill or Bills ^{c. 9.} of Exchange, the party or parties, on whom the same shall be drawn, shall refuse to accept the same, by underwriting the same, as aforesaid, the party to whom the said bill or bills are made payable, his servant, agent, or assigns, may and shall cause the said bill or bills to be protested for non-acceptance, as in case of foreign Bills of Exchange, any thing in the former act, or any other law to the contrary notwithstanding: for which protest there shall be paid two shillings, and no more."

"PROVIDED that the protest hereby required for non-acceptance shall be made by ^{s. 6.} such persons as are appointed by the former act to protest inland Bills of Exchange for non-payment."

"PROVIDED always, that no acceptance of ^{s. 5:} any such inland Bill of Exchange shall be sufficient to charge any person *whatsoever*, unless the same be underwritten or indorsed in writing thereupon: and if such bill be not accepted by such underwriting or indorsement in writing, no *drawer* of any such inland bill shall be liable to pay any costs, damages, or interest thereupon, unless such protest be made for non-acceptance thereof, and within *fourteen*

seen days after such protest, the same be sent, or otherwise notice thereof be given to the party from whom such bill *was received*, or left in writing at the place of his or her usual abode; and if such bill be accepted and not paid *before* the *expiration* of three days after the said bill shall become due and payable, then no *drawer* of such bill shall be compellable to pay any costs, damages, or interest thereupon, unless a protest be made and sent in manner and form above-mentioned: nevertheless, every drawer of such bill shall be liable to make payment of costs, damages, and interest upon such inland bill, *if any one protest be made of non-acceptance or non-payment thereof, and notice thereof be sent, given, or left, as aforesaid.*"

S. 6.

"PROVIDED, that no such protest shall be necessary, either for non-acceptance or non-payment, *unless the value be acknowledged and expressed in such bill to be received, and unless such bill be drawn for the payment of twenty pounds sterling or upwards.*"

S. 7.

"PROVIDED that nothing herein contained shall extend to discharge any remedy, that any person may have against the drawer, acceptor, or indorser of such bill."

6 Mod. 80,
31. 1 Salk.
131. 3 Salk.
69.
Brough v.
Perkins, 2
Ld. Raym.
992.

THESE acts are in many respects obscure, and the comments on them in many of the early reporters equally so. It was soon discovered, that from the general wording of both, and the provision in the eighth section of the latter, notwithstanding these statutes, the holder might still, by giving reasonable notice

notice without protest, recover against the acceptor, the drawer, or indorser; the amount of the original bill; and that a written acceptance was not necessary to charge the acceptor: 70. Vid. Page

• for that the word *damages* in these acts does not mean the original sum, that being recoverable before, but the loss accruing from the delay: and that the clause, which provides that "acceptance not expressed in writing on the bill should be sufficient to charge any person whatever," relates only to the non-recovery of *these* damages without a protest for non-acceptance. So far is perfectly intelligible. The same thing cannot be said of what follows: "If the drawer for want of protest or reasonable notice suffer any damage, that shall be borne by him to whom the bill is made, and if the damage amount to the whole sum mentioned in the bill, the payee shall not recover: the act seems only to take from the plaintiff his *interest and damages*, where he has *not* made a protest, or to give the *drawer* a remedy against him by way of action for the costs and damages." This evidently is intended as an explanation of that part of the first statute which provides, that "the person failing to protest is and shall be *liable* to all costs, damages, and interest, which shall accrue thereby." But it is manifest this provision could never be meant to *take* from a plaintiff that to which he was *not before entitled*: neither can it be imagined that it was intended to give an action to the drawer on account of damages which he could not sustain, but

but by being made answerable for the loss of another : to enable him to resist the claim of that other, who had not entitled himself to recover by neglecting to follow the directions of the act, was sufficient to protect the drawer against all possible loss. The clause is certainly inaccurate ; the word *liable* is equivocal ; but the meaning is manifestly this, that the person neglecting to protest, shall not be entitled to call on the drawer for his extraordinary damages, interest and costs, but must bear them himself.

THE professed intention of these acts was to put inland Bills of Exchange on the same footing with foreign ones ; so far as relates to the recovery of damages, interest, and costs, by means of the protest, they have done it ; but there are several minute particulars in which, from an attentive perusal of the acts, it will appear they still differ.

Page 62.

To the constitution of a Bill of Exchange, we have seen, it is not necessary that the words " value received " should be inserted, and the want of these in a foreign bill cannot deprive the holder of the benefit of a protest ; but that benefit in case of non-payment is not given to inland bills which want these words ; and therefore they cannot be protested for non-payment : and the second provides that " where these words are wanting, or the value is less than twenty pounds, no protest is *necessary* either for non-acceptance or non-payment." What may be the true meaning and operation of this provision is far from being

ing clear : by the natural construction of the words, it might be imagined the legislature meant to give damages on bills of these descriptions, without imposing on the holder the necessity of protesting : but that supposition is not consistent with the general purview of the two acts, so that the safest construction seems to be, that inland bills without the words "value received," or under twenty pounds, shall continue as at common law, and shall not be *entitled* to the privilege of a protest either for non-acceptance or non-payment.

IN foreign bills, there is no distinction between those payable at such a time after *date*, and after *sight* ; but the statute confines the benefit of protest on inland ones to those payable after *date* ; so that in *strictness* there can be no protest on those payable after *sight* : and this has been lately so adjudged.

IN foreign bills, where the acceptance is in words only, or in some collateral writing, a protest may be made for non-payment, as well as if the acceptance had been in writing on the bill : but the statute of William confines the protest for non-payment to those bills on which the acceptance is written ; and therefore, in order to have the benefit of a protest for non-payment, where the acceptance is collateral, the holder must protest for non-acceptance ; unless it be supposed that this clause is repealed, by that provision in the statute of Queen Anne, which says, "nevertheless, every drawer of such bill shall be liable to make payment of costs, damages, and interest on such inland bill, *if any one*

Leftley v.

Mills,

4 Term Rep.
170.

Vid. Mar. 170

protest be made of non-acceptance or non-payment, and notice thereof be sent, given, or left as aforesaid :" which indeed seems to be the only construction that can ascribe any meaning to the clause : for if this be not the true construction, then this provision can mean nothing more than that, where only acceptance is refused, but the money paid when due, there a protest for non-acceptance alone is sufficient ; and that where the bill is accepted, but not duly paid, then a protest for non-payment is sufficient ; which would be to suppose that the legislature meant nothing at all.

IF, indeed, this clause be not a repeal of the clause in the former statute, the general practice of merchants in the city of London is unwarranted ; for a protest is hardly ever made for non-acceptance of an inland bill ; it is only noted for non-acceptance, and if not paid when due, it is frequently protested for non-payment ; however, notice must be given of the non-acceptance and noting, otherwise, according to the cases before cited, the holder takes the risk upon himself.

THE preceding clauses of the sixth section of this statute of Queen Anne creates indeed a difficulty supporting this construction of the latter clause ; for if this be a repeal of the clause in the statute of King William, it is very difficult to say whether it may be considered as a repeal of those also ; and it would be too much to say that the legislature has made a provision in the former part of a single section of an act of parliament, and in the latter

latter part repealed it: the only way I can see of solving this difficulty is, to take the whole section together, and to endeavour to give it one cumulative construction, construing the preceding clauses in the alternative, and then it may be considered as running thus: "If such bill be not accepted by underwriting or indorsement, when presented for acceptance, and, when presented for payment, be not paid; then if it be not protested either for non-acceptance or for non-payment, the drawer shall not be liable for damages, interest, and costs."

If this be the true construction of this clause, there appears to be another difference still subsisting between foreign and inland Bills of Exchange; for where acceptance and payment are both refused on foreign bills, it seems necessary that there should be a protest for each; at least it is decided that in such a case, a protest for non-payment only is not sufficient.

Tid. ante
page 137,
738.

ANOTHER difference between foreign and inland bills with respect to the protest is, that the former must be presented for payment *before* the expiration of the last day of grace, and in time to have the protest sent off the same night, if the post then sets out; but on inland bills the protest for non-payment cannot be made till *after* the expiration of the three days, and notice may be sent at any time within *fourteen* days after the protest.

Vid. Lestley
v. Mills.
4 Term Rep.
170.

IT is also remarkable that in inland bills, where damages, interest and costs are to be recovered, there is more indulgence in the time

Vid. ante
page 126.

time allowed for notice of non-payment than where only the principal sum is to be recovered; for when there is no protest for non-payment, presentment for payment must be made so early on the last day of grace that the holder may give notice of non-payment by the next post.

S. 1.

THAT part of the statute of Queen Anne which puts Promissory Notes on the same footing with inland Bills of Exchange, makes no express provision for protesting them for non-payment; but there can be no doubt that the same privilege is impliedly conferred on them, and in practice such a protest is frequently made.

Beaves, 456.

WHEN a bill is drawn for the account of a third person, and is accepted according to its tenor for his account, and he fails without making provision for its payment, the acceptor must discharge the bill, and can have no redress against the drawer.

Id. ibid.

BUT if the drawee do not choose to accept on the account of him for whose account he is advised the bill is drawn, he may accept for the account and honour of the drawer.

Id. ibid.

OR, if a bill made payable to order, be indorsed by a substantial man before acceptance be demanded, the drawee, if he have any doubt about the drawer, or of him on whose account it is drawn, may accept it for the honour of the indorser; but in this case he must first have a formal protest made for non-acceptance, and should send it without delay to the indorser for whose honour he has accepted it.

SUCH

SUCH acceptances as these are called *ac-* Id. 458.
ceptances supra protest; and have this effect
 with respect to the security of the acceptor,
 that they give him a right to call on the party
 for whose honour he accepts; and in the case
 of an acceptance for the honour of the indor-
 ser, on him and all the parties before him;
 whereas a simple acceptance, according to the
 tenor of the bill, gives him a remedy only a-
 gainst the drawer, or against him on whose ac-
 count the bill is drawn, as the case may be.

THE method of accepting *supra protest* is
 this; the acceptor must personally appear with
 witnesses before a notary, (whether the same
 who protested the bill or not, is of no impor-
 tance) and declare that he accepts such pro-
 tested bill in honour of the drawer or indor-
 ser, &c. and that he will satisfy the same at
 the appointed time; and then he must sub-
 scribe the bill thus, "Accepted *supra protest*;
 in honour of T. B. &c."

BUT this acceptance *supra protest* may be Id. 457
 so worded, that though it be intended for the
 honour of the drawer, yet it may equally bind
 the indorser, and in such a case it must be
 sent to the latter.

IF the person on whom the bill is drawn
 refuse to accept it, any *third* person after pro- Id. *ibid*;
 test for non-acceptance may accept *supra pro-*
test for the honour of the bill or of the draw-
 er, or of any particular indorser: if he accept
 for the honour of the bill or of the drawer, he
 is bound to all the indorseees as well as to the
 holder: if in honour of a particular indorsee,
 then to all subsequent indorseees.

Id. 457, 458. ANY one accepting a bill *supra* protest, though without the orders or knowledge of the person for whose honour he accepted it, has a remedy against that person, who is bound to satisfy him as if he had acted entirely by his directions, for his commission, postage, and other charges.

Id. 457. If a bill be protested for non-acceptance, and after it has been accepted *supra* protest by a third person, the drawee, on receiving fresh advice and orders, determine to accept and pay it, the acceptor *supra* protest may permit him, though the holder cannot be obliged to free him from his acceptance; and if the two acceptors agree, the drawee must pay the other his commission, charges, &c. as it was by his acceptance that the bill was prevented from being returned protested.

Id. 458. If the acceptor of a bill for the honour of the drawer or indorser, receive his approbation of the acceptance, then he may safely pay the bill without any protest for non-payment. But if the person, for whose honour the bill was accepted, either return no answer to the advice, or express a disapprobation of the acceptance, then the acceptor *supra* protest must cause a formal protest to be drawn up for non-payment against him to whom the bill was directed, and on his continuing to refuse payment, must then pay it for him.

Id. ibid. WHEN a bill is protested for non-payment, any man may pay it under protest, for the drawer's or indorser's honour, even he who made or he who suffered the protest; but he must

must previously declare before a notary, for whose honour he discharges it; and of this the notary must give an account to the parties concerned, either jointly with the protest, or in a separate instrument.

HE who discharges a bill protested for non-payment, in honour of the drawer, has his remedy against the latter, but not against the indorsers; but he who discharges a bill protested for non-payment, in honour of an indorser, has his remedy not only against that indorser, but against all that were before him, including the drawer; but he has no right against subsequent indorsers. Beaves, 459.

A MAN, after having given a simple acceptance to a bill, cannot satisfy it under protest, in honour of an indorser, because as acceptor, he has already bound himself to that indorser; but a drawee, not having yet accepted the bill, may discharge it for the honour of the indorser or drawee, as if he were a third person unconcerned. Id. 458.

YET it is said that the possessor of a bill, protested for non-payment, is not bound to admit of its discharge from a third person under protest, either in honour of the drawee or of any indorser, unless he declare and prove that the honour of that bill was particularly recommended to him: and if the protested bill be indorsed by the possessor's correspondent, and was remitted by him, then the possessor ought not to admit of any payment in honour of the indorsements, but under the express condition, that the payer shall have no redress against the said correspondent. Id. ibid.

WHAT

WHAT is said with respect to the *payment* of a bill *supra* protest is applicable to that of a Promissory Note.

Id. 455.

THE effect of the acceptance is to give credit to the bill, and to render the acceptor liable according to the tenor of his acceptance; the very act of accepting implies an acknowledgment that he has effects of the drawer in his hands.

Symonds, v. Parminster, 1 Wils. 185.

IF therefore the drawee accept a bill generally, and by reason of his non-payment the drawer is obliged to pay it, the latter, as drawer, may maintain an action against him, not only for the principal sum, but, in case of a protest, for damages, interest, and costs.

Doug. 249.

Mar. 17. Beawes, 454.

IF indeed the drawee have no effects of the drawer in his hands, and notwithstanding accept the bill, he has his remedy, if he pay it, against the drawer; but with regard to every body besides, the acceptor is considered as the original debtor, and to be entitled to have recourse against him, it is not necessary for the holder to shew notice given to him of non-payment by any other person.

WHEN a bill is once accepted absolutely, it cannot in any case be revoked, and the acceptor is at all events bound, though he hear of the drawer's having failed the next moment, even if the failure was before the acceptance.

BUT the acceptor may be discharged by an express declaration of the holder, or by something equivalent to such declaration.

BLACK

BLACK held, as indorsee, a bill drawn by one Dallas, and accepted by Peele. **Black v. Peele**, cited *Doug.* 237. (249.) **Black** arrested Peele, but finding that no consideration had been given for the acceptance, his attorney took security from Dallas, and sent word to Peele "that he had settled with Dallas, and he needed not to trouble himself any further." Dallas afterwards become bankrupt, and then **Black** demanded payment of Peele. The cause was tried first before Lord Mansfield, and afterwards by Chief Justice de Grey, who both held that the acceptor was discharged.

IN another case a book of the plaintiff's was produced in which the bill was entered, and over against it this memorial, "Mr. Pulteney's acceptance annulled." The jury however gave a verdict for the plaintiff; but the Court of Exchequer granted a new trial, on the ground that this was an implied discharge; and on the second trial before Chief Baron Skinner, one Alexander, who had indorsed the bill to the plaintiff, was produced as a witness on the part of the defendant, and swore that Walpole had positively agreed to consider Pulteney's acceptance as at an end; on which the jury found for the defendant.—Walpole had kept the bill from 1772 to 1775 without calling on Pulteney. **Walpole v. Pulteney**, cited *Doug.* 237. (249.)

BUT no circumstances of indulgence shewn to the acceptor by the holder, nor any attempt by him to recover of the drawer, will amount to an express declaration of discharge.

Dingwall
v. Dunster,
Doug. 235.
(247.)

DUNSTER accepted a bill merely to lend his credit, and to accommodate Wheate, the drawer. Fitzgerald, the payee, indorsed it to Dingwall, and delivered it to him in payment for jewels. After it became due, the plaintiff, understanding that the acceptor never had any consideration for it, and that Wheate was the real debtor, wrote to one Ready, Wheate's Attorney, on the 6th of February, and on the 4th of November, 1775, pressing him for the payment. Dunster, on the 13th of February, 1775, wrote a letter to Dingwall, thanking him in strong terms for not proceeding against him, but mentioning in the same letter, that he had been informed by a person who had been sent from him to Dingwall on the business, that Wheate had taken up the bill, and given another to Dingwall's satisfaction. It did not appear that Dingwall took any notice of that letter. But he for some time received interest on the bill from Wheate, and also the principal due by another bill, made at the same time, and drawn and accepted by the same parties, and under like circumstances. The plaintiff suffered several years to elapse without calling on Dunster, or treating him as his debtor.

THE question was, whether the plaintiff, by his conduct, had discharged the acceptor; and the court unanimously held that he had done nothing from which it could be concluded he meant to abandon his claim against him.— He had done right in applying to Wheate for payment, as he was apprised that he was in
fact

fact the debtor, and Dunster was so far sensible of his kindness, as to thank him for his indulgence in a letter; had the suggestion in that letter been true, relative to the plaintiff's having delivered up the bill to Wheate, that might have made a material difference: but the plaintiff having returned no answer to the letter, and the fact not having been attempted to be proved at the trial, it was probable the assertion was not warranted. This case had no resemblance to the two preceding cases which had been cited in argument.

NEITHER will any length of time short of the statute of limitations, nor the receipt of part of the money from the drawer or indorser, nor a promise by indorsement on the bill by the drawer to pay the residue, discharge the holder's remedy against the acceptor.

A BILL was drawn by one brother and accepted by another. When it became due, the payee received of the drawer 3l. 15s. 4d. and at the same time the following indorsement was made on the bill: "Received on account of this bill 3l. 15s. 4d.:" "Balance remaining due 26l. 4s. 8d. I promise to pay Mr. Thomas Ellis, within three months from the date of this." Signed by James Galindo, who was the drawer. The balance was never paid, and at the distance of three years an action was brought against the acceptor; the cause was tried before Lord Mansfield, who thought the acceptor was discharged, and non-suited the plaintiff. The ground of his Lordship's opinion probably was, that the indorsement was

Ellis v.
Galindo,
Doug. 238.
(250.) in the
notes.

as a new bill accepted by the plaintiff in payment of the old ; and on an application for a new trial, his Lordship said he did not think that this case at all interfered with the determination in Dingwall and Dunster. The plaintiff's counsel contended that the indorsement was made to prevent an imputation of neglect, because delay in coming against an acceptor may discharge a drawer or indorser. The court all seemed to think that this was a question of intention, and ought therefore to have been left to the jury, but they refused a new trial on account of the smallness of the sum.

Bacon v.
Searles, 1
H. Bl. Rep.
C. B. 88.

BUT when the holder of a bill receives part of the money from the drawer, he cannot recover more than the residue from the acceptor ; and where the drawer pays the whole, the acceptor is completely discharged.

Burrows v.
Jemino, in
Canc. M.
13 G. Str.
733.

AND where a merchant, having accepted a bill in a foreign country, has been discharged by the laws of that country, he cannot afterwards be sued here on his acceptance, though the circumstances under which he was discharged there, would not discharge him here ; because he must be taken by his acceptance to have entered into such engagement only as was from thence implied by the laws of the country in which he resided.

BY the law of Leghorn, if a bill had been accepted and the drawer had failed, and the acceptor had not sufficient effects of the drawer in his hands at the time of acceptance, the acceptance

acceptance became void. This happening to be the case of one Burrows, he instituted a suit at Leghorn, to discharge himself of his acceptance, which was accordingly vacated by a sentence in the court there. He afterwards returned to England, and was sued here on his acceptance; on which he filed a bill in Chancery for an injunction and relief. Lord Chancellor King was clearly of opinion that this cause was to be determined according to the laws of the place where the bill was negotiated; and the acceptance having been vacated by a competent jurisdiction, that sentence was conclusive, and bound the court here.

IF the drawee offer a conditional acceptance, and the holder, instead of acquiescing, do something which shews that he does not admit such acceptance, the drawee is not bound, even if the event afterwards happen on which the acceptance was to depend.

A BILL payable to one Lenox, or order, forty days after sight, was drawn on the defendant; Lenox indorsed it to the plaintiff: Allen, the plaintiff's clerk, presented the bill to the defendant, who lived in London, for acceptance: the defendant told him that the drawer had consigned a ship and cargo to him and another person at Bristol, but as he could not then tell whether the ship would arrive at London or Bristol, he could not accept at that time: on which Allen said that he would leave the bill upon this condition, that in the event of the defendant's not accepting it as from the day when it was presented,

Sproat v.
Mathews,
1 Term Rep.
182.

presented, he should be at liberty to note it for non-acceptance as from that time; to this the defendant assented, and the bill was accordingly left at his house till a future day, when Allen called again in company with the plaintiff, to know whether the defendant would accept the bill or not, who on being pressed to accept it, said that the bill was a good one, and would be paid, even if the ship were lost. Allen immediately on this carried the bill to a notary public, and had it noted for non-acceptance from the time when it was first left with the defendant. The ship afterwards arrived safe at the port of London, and the defendant disposed of the cargo. This being a conditional acceptance, the conduct of the plaintiff was held to have been a waiver of it, and to have precluded him from holding the defendant to his engagement.

THOUGH an agreement to accept, on condition of a certain fund being consigned to the acceptor for the discharge of the bill, may amount to an acceptance on the performance of the conditions, yet if the indorsee take the fund out of the hands of the drawee, he discharges him from his engagement.

ROWLAND HUNT, in Dominica, agreed with a house there, that his partner, Thomas Hunt, in London, should, on a cargo of tobacco being consigned to him, with the bills of lading, and an order for insurance, accept such bills as that house should draw on him, at the rate of 8ol. per hhd. from ninety days to six months sight: insurance for the sum of 3600l.

Mason v.
Hunt,
Doug. 284.
(297.)

3600l. was ordered on forty hhds. of tobacco, which Thomas Hunt procured for a premium of 303l. He afterwards received a letter, advising him of six Bills of Exchange being drawn on him for 3200l. in consequence of Rowland Hunt's agreement, payable to one of the partners of the house, on account of forty hhds. of tobacco, and indorsed by him to Mason. The bills arrived, and were presented for acceptance. Thomas Hunt refused to accept them, on an apprehension that the tobacco was not worth the money at which it was valued. After a negotiation of some days, Mason took the bill of lading for the forty hhds. and the policy of insurance out of the hands of Thomas Hunt. The tobacco afterwards arriving, was received and sold by the plaintiff Mason, and produced only 1400l. The occasion of this difference between the real produce and the valued price did not appear. Under the direction of Lord Mansfield, a verdict was given for the defendant, and on an application for a new trial, his Lordship expressed himself thus: An agreement to accept, may in many instances amount to an acceptance: but an agreement is still but an agreement, and if it be conditional, and a third person, knowing of the conditions annexed to the agreement, take the bill, he takes it subject to such agreement. Here there were many things specified as the conditions of the acceptance—the number of hhds. to be delivered—of a certain value rated by the hhd.—the insurance—the bills of lading—

lading—the consignment. On the face of the agreement, I thought at the trial, and still incline to think, that the meaning of the parties was, that tobacco should be consigned which should be worth 80*l.* per hhd. this fell immensely short of that sum. It is plain the *Hunts* never meant to be in advance, and I think so great a difference in the value, such a fraud as to entitle the defendants to relief against the agreement. But as to this the rest of the court have doubted, chiefly because there is no evidence to shew the decrease in the value arose; whether from the inferiority of the quality, or the fluctuation in the market. But the rest of the court are extremely clear that the subsequent conduct of the plaintiff makes an end of the whole, and I think the reasons are unanswerable. As to that part of the case, it stands thus: The *Hunts* say, “we are not bound: This is an imposition: The tobacco is of inferior value. The letter represents it as worth 80*l.* the insurance makes it 90*l.* per hhd. and it turns out not to be worth 40*l.*” If *Mason* had meant to say, “you are liable, and shall pay the bills,” what would his conduct have been?—he would have left the policy of insurance and the bills of lading in their hands, and sued them upon the acceptance. The temptation to accept was the commission on the consignment, and they were to have the security of the goods and the insurance. But the plaintiff undoes all this, and says, then I will take all from you, security, commission, &c. This was saying, “I will stand in your place,
but

but not so as to be answerable for more than the produce of the tobacco." It is impossible the defendants could mean to accept, without any benefit or security. We are all clear that this made an end of the agreement.

THOUGH the receipt of part from the drawer or indorser be no discharge to the acceptor for more than the part received, yet the receipt of part from the acceptor of a bill, or the maker of a note, is a discharge to the drawer and indorsers in the one case, and to the indorsers in the other, unless due notice be given of the non-payment of the residue; for the receipt of part from the maker or acceptor without notice, is construed to be a giving of credit for the remainder, and the undertaking of the preceding parties is only conditional, to pay in default of the original debtor, on due notice given: but where due notice is given that the bill is not duly paid, the receipt of part of the money from an acceptor or maker will not discharge the drawer or indorsers; for it is for their advantage that as much should be received from others as may be.

1 *Ld. Raym.*
744. *Kel-*
lock v.
Robinson,
2 *Str.* 745:
cited 1
Willf. 48.

Bul. N. P.
271. cites
Johnson v.
Kenyon,
C. B. Hil.
5 *G. III.*

THE receipt of part from an indorser, is no discharge of the drawer or preceding indorser, for more than the part received.

Vid. John-
son v. Ken-
yon, Willf.
262.

If the drawer of a note, or the acceptor of a bill, be sued by the indorsee, and the bail for the drawer or acceptor pay the debt and costs, this absolutely discharges the indorser as much as if the principal had paid the note

or the bill; and the bail cannot afterwards recover against the indorser in the name of the indorsee.

Hull v. Pit-
field, 1
Wils. 46.

ONE Scraiston drew a note, by which he promised to pay to one Pitfield, or order, the sum of 200l. and indorsed it to Hull: Hull brought an action against Scraiston, in which he held him to special bail; Hull recovered interlocutory judgment against Scraiston, on which his bail paid the debt and costs, amounting to 220l. 15s. Hull executed an instrument between himself on the one part, and the bail on the other, reciting the note, and that he had recovered interlocutory judgment on it against Scraiston: that the bail had purchased the note, and paid the debt and costs, in consideration of which Hull assigned over to them the note and the interlocutory judgment, with a power of attorney to make use of Hull's name to sue the indorser, and covenanted in the common manner, not to do any act to hinder the bail from recovering the money on the note. An action was afterwards brought in Hull's name against Pitfield the indorser, on which these circumstances were stated, and the court held the indorser was discharged by the payment by the bail in the former action, as much as if the drawer had paid the money himself.

THOUGH, in order to entitle himself to call on any of the preceding parties, in default of the acceptor of a Bill of Exchange, or of the maker of a Promissory Note, it be necessary that the holder should give due notice of such default to the party to whom he means

to resort, yet notice to that party alone is sufficient as against him : it is not necessary that any attempt should be made to recover the money of any of the other collateral undertakers ; or in case of such attempt being made, to give notice of its being without effect. Thus, in order to entitle himself to recover against an indorser, it is not necessary for the indorsee to shew an attempt to recover against the drawer of a Bill of Exchange, or the payee indorser of a Promissory Note.

CONTRADICTORY opinions on this point, 1 Salk. 137. however, being found in an early reporter, 133. the court, on a subsequent case of an action by an indorsee of a *foreign* Bill of Exchange against the indorser, where it was objected that no demand was made on the drawer, thought Bromley v. Frazier, 1 Str. 441. it necessary to take time to consider the subject, and, on mature deliberation, delivered their opinion, that no such demand was necessary to be shewn. "The design of the law of merchants," they said, "in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie; now to require a demand on these bills, as would deter every body from taking them: the drawer lives abroad, perhaps in the Indies, where the indorsee has no correspondent to whom he can send the bill for a demand, or if he could, yet the delay would be so great, that nobody would meddle

meddle with them. Suppose it were the case of several indorsements, must the last indorsee travel round the world before he can fix his action on the man from whom he received the bill? In common experience every body knows, that the more indorsements a bill has, the greater credit it bears; whereas, if those demands were all necessary to be made, it must naturally diminish the value, by how much more difficult it would render the calling in of the money. And as to the notion that has prevailed, that the indorser warrants only in default of the drawer, there is no colour for it, for every indorser is in the nature of a new drawer, and at *nisi prius* the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring of a protest for non-acceptance is not because a protest amounts to a demand, for it is no more than giving notice to the drawer to get his effects out of the hands of the drawee, who, by the others drawing, is supposed to have sufficient wherewith to satisfy the bill."

THIS case settled the law with respect to foreign Bills of Exchange; but as to inland bills, great doubts still remained. These were occasioned by the inaccurate and confused manner in which some cases were reported, in which it did not appear whether the question arose on Bills of Exchange or Promissory Notes, and from confounding the term drawer as applied to the latter with the same term as applied to the former. There could

could be no doubt, but that to recover against the indorser of a note, due diligence must be shewn to have been used to obtain payment from the drawer; but in the analogy between the two instruments, the drawer of the note does not resemble the drawer but the acceptor of the bill: for want of attention to this distinction, reporters have been led to represent six chief justices to have been of different opinions on this point. Holt, Eyre, and Raymond are said to have held, that a demand on the drawer of a bill was necessary; and Macclesfield, Pratt, and King, that it was not.

THE principal case to which a reference is made to prove that Holt was of opinion, that in actions on Bills of Exchange, it is necessary to prove a demand on the drawer, is reported in three different books; Lord Raymond, Salkeld, and 12 Modern. Lambert v. Oakes.

IN Lord Raymond, it appears manifestly that the question arose upon a Promissory Note. "R. signed a *note* under his hand, payable to Oakes, or his order; Oakes indorsed it to Lambert; on which Lambert brought the action for the money against Oakes. Per Holt, C. J.—He ought to prove that he had demanded, or done his endeavour to demand this money of R. before he can sue Oakes upon the indorsement. The same law if the bill were drawn on any other person, payable to Oakes, or order." That is, a demand must be made of the person on whom the bill is drawn. And other parts of the case manifestly 1 Lord. Raym. 443.

festly shew this to have been the *meaning*.— For my Lord C. J. Holt is reported to have said, “the indorsement will subject the indorser to an action; because it makes a new contract, in case the person *on whom it is drawn* does not pay it.” Again, if the indorsee does not demand the money payable by the bill, of the person *upon whom it is drawn*, in convenient time, and afterwards he fails, the indorser is not liable.”

127, there
called Lam-
bert v.
Pack.

IN Salkeld, the case is confounded: it is stated to be a bill of Exchange, and “that the demand must be made on the *drawer*, or him upon whom it was drawn.” Holt had said, that a demand must be made of the *maker* of a Promissory Note, (calling on him the *drawer*;) and in the case of a Bill of Exchange, of *him* upon whom the bill is drawn. The report jumbles both together, as applied only to a Bill of Exchange, mislaid, very probably, by the equivocal meaning of the term *drawer*, and by the chief justice’s reasoning in the case of a Promissory Note, from the law upon Bills of Exchange.

244.

IN 12 Modern—The case is mistaken too, and stated as upon a Bill of Exchange, and as a determination that there must be a demand upon the drawer of the Bill of Exchange.— And yet the report itself shews demonstrably, that what was said by Holt, was applied to the *maker* of a Promissory Note, (calling him the *drawer*.) For the report makes him argue thus:—“So, if the bill was drawn on any *other* person, payable to Oakes or order:” which shews that the case in judgment was
“not

“ not a bill drawn on *another* person, but payable to Oakes by R. *himself*.

EVERY inconvenience suggested in the case of foreign Bills of Exchange, holds in a great degree, and every other argument holds equally, in the case of inland bills: the indorsee does not trust to the credit of the original drawer: he does not know whether such a person exists, or where he lives, or whether his name may have been forged. The indorser is his drawer, and the person to whom he originally trusted in case the drawer should not pay the money. And it is worth while to observe, that the act of William the third requires notice of the protest to be given to the person *from whom* the bill was received. He may have another remedy against the first drawer as assignee to the indorser, and standing in his place.

ON these principles it is now finally settled, that to entitle the indorsee to recover against the indorser of an *inland* Bill of Exchange, it is not necessary to demand the money of the first drawer.

Heylin v. Adamson,
2 Bur. 669

ANCIENTLY a distinction seems to have been taken between the case of a Bill of Exchange, given in payment of a precedent debt, and that of one given for a debt contracted at the time the bill was given. In the latter case the person who received it must have used due diligence to recover the money of him on whom it was drawn; otherwise he could not resort to the party from whom he received it, and charge him on the original contract. But in the former case, the bill was
not

not considered as payment, unless the money was paid by the drawee, and no diligence seems to have been necessary in the holder to obtain that payment, nor any notice to the person from whom he received it of the failure in payment; that this was once held to be the law, the following case is a proof.

Clarke v.
Mundal,
3 Wil. & M.
cor. Holt,
C. J. at
Guildhall.
1 Salk. 124.
3 Salk. 68.

ONE Mundal, having a Bill of Exchange payable to him, indorsed it to Clarke, to whom he was indebted: Clarke afterwards brought an action on the original contract against Mundal, who, in his defence gave in evidence this bill indorsed to Clarke, who had kept it so long in his hands after it became payable, that it ought to be considered as money paid: but the chief justice refused to receive this as evidence of payment, but took the distinction above-mentioned, saying, that if A sells goods to B, and B is to give a bill in satisfaction, B is discharged, though the bill be never paid, for the bill is payment: that however in the case of a precedent debt, if part of the money on the bill were paid, it should go in discharge of so much.

S. 7.

BUT by the statute of Queen Anne before mentioned it is enacted, "that if any person accept a Bill of Exchange for and in satisfaction of any former debt, or sum of money formerly due to him, this shall be accounted and esteemed a full and complete payment of such debt, if such person accepting of any such bill for his debt do not take his due course to obtain payment of it, by endeavouring to get the same accepted and paid, and make his

his protest according to the directions of the act, either for non-acceptance or non-payment."

If a Bill of Exchange be lost by him with whom it was left for acceptance, or if by mistake he have given it to a wrong person, or on any other account the holder cannot obtain a return of his bill, either accepted or unaccepted, he who lost it must give the person to whom it was payable, or to his order, a note of hand for the payment of its amount, on the day it becomes due; on delivery of the second if it arrive in time, or if not, on the same note, which in all cases is to have the law and privileges of a Bill of Exchange; and if the acceptor refuse this, the holder must immediately protest for non-acceptance, and when due must demand the money, (though he have neither note nor bill) and if that be refused, a protest must be regularly made for non-payment." Beawes, 476.

MARIUS advises, that as soon as the possessor of a bill misses it, he should have immediate recourse to the acceptor, and in the presence of a notary and two witnesses, acquaint him with its being lost; and signify to him that at his peril he pay it to none but those with his order: and he adds, that no one should refuse payment of a bill he has accepted merely because it is missing: as he asserts, that protest being made for non-payment, on offer of a sufficient security and indemnification, will oblige the acceptor to make good: Mar. 19, 20.

all losses, re-exchange, and charges, as having wilfully occasioned them.

S. 3.

So, by the statute of William it is provided, that "in case any *such* inland Bill or Bills of Exchange," as mentioned in the former part of the act, "shall happen to be lost or miscarried within the time before limited for payment of the same, then the drawer of the said bill or bills is and shall be obliged to give another bill or bills of the same tenor with those first given, the person or persons to whom they are and shall be so delivered giving security, if demanded, to the said drawer, to indemnify him against all persons whatsoever, in case the said Bill or Bills of Exchange so alledged to be lost or miscarried shall be found again."

BUT if a bill lost by the possessor should afterwards come into the possession of any person who shall have paid a full and valuable consideration for it, without knowledge of the circumstance of its having been lost, the drawer and the acceptor, if the bill was accepted, and the drawer if it was not, must pay it when due to such a fair possessor; so that Marius's law seems very doubtful, and the provision of the statute may in many cases be useless to the loser of the bill.

BUT against the person who finds the bill, the real owner may maintain an action of trover.

Vld. page
104—106.

1 Salk. 126.
1 Ld. Raym.
738.

CHAP.

C H A P. VIII.

Of the Remedy on a BILL or NOTE.

BEFORE the doctrine of Bills of Exchange was well understood, and the nature and extent of the customs relative to them fully recognized by the courts, the remedy on them was sought in different forms of action, according to the opinions which were entertained of the applicability of these several forms to the respective situations of the parties.

OF cases, however, where a remedy was sought in any other form of action than that founded on the custom respecting Bills of Exchange, or on the statute respecting Promissory Notes, the reports are but few; and of these few some are so inaccurate, and in others the judges express themselves in terms so vague, that it is not easy to deduce from them any general rule.

IN one book it is laid down that the payee of a bill cannot maintain an action of debt against the acceptor, because there is no privity between them, because the acceptance does not create a duty, any more than a promise by a stranger to pay, if the creditor forbear his debt, which renders the stranger liable, but not in an action of debt, and because on a

Hardr. 489.
487.

search

search for precedents, no one could be found of an action of debt on the acceptance of a Bill of Exchange.

Brown v.
London,
1 Mod. 285.
1 Vent. 152.
1 Freem. 14.
1 Lev. 298.
D. 11.
Mod. 190.
Comb. 204.
1 Salk. 125.
12 Mod. 37.

IN another case, reported in several books, it is laid down that an *indebitatus assumpsit* will not lie on the acceptance of a bill of Exchange; perhaps on the same principle that it was determined that debt would not lie, for an allusion is made to the former case.

IN other books, it is laid down in general terms that an *indebitatus assumpsit* will not lie on a bill.

IN one of these, however, in another place, it is held that the payee of a bill, which imports to have been given for value received, may maintain *indebitatus assumpsit* against the drawer.

AND in another it is said, that it will only lie against the drawer, on a bill which appears to have been given for value received.

ON a Promissory Note a case is reported in two books, but in a manner so inaccurate, that it can only be collected, that in that particular case it was determined that debt would not lie; for it does not appear between what parties the action was, though the assertion is general that debt will not lie on a Promissory Note.

1 Mod.
Hut. 312.
Hut. 23.

IT is said in another place, that debt will lie against the maker of the note, though not against the indorser.

1 Freem.
Hut. 342.

AND a very able pleader has given a precedent of a declaration in debt by the administratrix of the payee of a note against the maker.

IT has been also held by Lord Mansfield, *Kestebower v. Tims*, B. R. E. 22 G. III. Bailey 47. that the indorsee of a note might maintain *indebitatus assumpsit* upon it, against the person who indorsed it to him.

THE conclusion, resulting from the whole, seems to be this; that where a privity exists between the parties, there an action of debt or *indebitatus assumpsit* may be maintained; but that where it does not exist, neither of these actions will lie.

A PRIVACY exists between the payee and the drawer of a Bill of Exchange, the payee and drawer of a Promissory Note; the indorsee and his immediate indorser of either the one or the other, and perhaps between the drawer and acceptor of a bill; provided that in all these cases, a consideration passed respectively between the parties.

BUT it seems to be considered, that no privity exists between the indorsee and acceptor of a bill or the maker of a note, or between an indorsee and a remote indorser of either.

THE action which is now usually brought on a Bill of Exchange is a special action on the case, founded on the custom of merchants.

That custom was not at first recognized by the court, unless it was specially set forth: and therefore it was deemed necessary to set forth, by way of inducement, so much of it as applied to the particular case, and imposed on the defendant a liability to pay. *D. per Powell, J. 1 Ld. Raym. 21. Vid. 1 Will. 129.*

THUS in an action by an indorsee against the acceptor, it was necessary to state a custom among merchants, that "if any merchant drew

drew a Bill of Exchange, and directed it to his correspondent, and by that bill requested his correspondent to pay a sum of money to a third person, or to his order, and the correspondent accepted the bill, then if the person to whom or to whose order the money was to be paid indorsed the bill, the acceptor, on the bill's being presented to him for payment, by the person to whom it was indorsed when it became due, by the custom of merchants, became liable to pay the money to the indorsee :” then the particular circumstances of the case were stated as coming under that part of the general custom on which the action was brought.

Vid. Richardson's
Practice.
C. B.
vol. 2. p. 74.

SO, in an action by an indorsee against the drawer for non-payment by the acceptor, it was necessary to state that “ there was a certain custom among merchants, that if a merchant drew a Bill of Exchange, and directed it to his correspondent, and by that bill requested him to pay a sum of money to a third person, or his order, and the correspondent accepted the bill, then if the person to whom, or to whose order the money was to be paid, indorsed the bill, and the indorsee presented the bill to the acceptor when due, who refused payment, then if the indorsee protested it, and returned it to the drawer, together with the protest, the drawer, by the custom of merchants, was liable to pay the principal sum, with damages arising from non-payment at the time ;” and then to state the circumstances in the particular case, to shew that it fell within the custom.

So,

So, if a man subscribed a bill for himself and partner; in an action against them on this subscription, it was thought prudent to state a custom, "that if two were partners, jointly merchandizing together, and if one of them subscribed a bill for the payment of money by him and his partner, mentioned there, to another, and his order, then both the partners were bound to that person; and that if the person to whom this bill was payable indorsed it to another, then those partners ought to pay such bill, on notice, to him to whom it was so indorsed: and then to state the facts coming under this custom.

Vid. Pinckney v. Hall,
1 Ld. Raym.
175.

WHERE the action was on an inland Bill of Exchange, it was usual to lay the custom as existing between the two cities where the drawer and acceptor lived; and if both lived in the same place, to allege its existence between merchants and others residing in that place.

Vid.
3 Mod. 86.

Vid.
4 Mod. 242.

BUT when the custom of merchants was recognized by the judges as part of the law of the land, and they declared they would take notice of it as such *ex officio*, it became unnecessary to recite the custom at full length; a simple allegation that "the drawer, mentioning him by his name, according to the custom of merchants, drew his Bill of Exchange, &c." was sufficient.

3 Mod. 226.
Carth. 83,
270.
1 Shaw. 130.

AND if the plaintiff, still adhering to former precedents, thought proper to recite the custom in general terms, and did not bring his case within the custom so set forth; yet if
by

by the law of merchants, as recognized by the court, the case as stated entitled him to his action, he might recover, and the setting forth of the custom was reckoned surplusage and rejected.

Mogadara
v. Holt.

1 Show. 317.

THUS, where the plaintiff set forth a custom of merchants, that if the merchant to whom the bill is directed accept it after indorsement, and fail of payment to the indorsee *at the time*, in such case, on the bill's being protested for non-payment, and notice of it given to the drawer, the latter becomes liable to pay the same, with damage to the indorsee: and the case set forth was, that the indorsee had presented it to the drawee *a month after the time* of payment, who accepted it, but failed to pay it, on which it was protested, and notice given to the drawer: though this case does not come within the custom set forth, yet because by the law of merchants an action might be sustained on this case, the declaration was held good, and the custom rejected as surplusage.

2 Ed. Raym.
1542.

ON the statement of any material fact, it is still usual to allude to the custom, by alleging that it was done "according to the custom from time immemorial used and approved among merchants:" but even that is unnecessary, it being sufficient if the facts stated come within the custom as recognized.

3 and 4
Ann. c. 9.

As the action on a Bill of Exchange is founded on the custom of merchants, so that on a Promissory Note is founded on the statute, and usually refers to it; though, it is conceived,

ceived, such reference is as unnecessary in this case, as that to the custom in the other.

IN both cases, however, it is necessary that all those circumstances should either be expressly stated, or clearly and inevitably implied, which, according to the characters of the parties to the action, must necessarily concur in order to entitle the plaintiff to recover.

IN all cases arising on a Bill of Exchange, it is necessary to state that the drawer made his bill, and directed it to the drawee, and thereby directed him to pay.

IN all those arising on a Promissory Note, that the maker made his Promissory Note, and thereby promised to pay.

IN stating the bill or the Note, regard must be had to the legal operation of each respectively. 1 Bur. 324.
325.

IT has been decided that the legal operation of a bill or of a note, payable to a fictitious payee, is, that it is payable to the bearer, and therefore, if that decision be right, it is proper, in the statement of such a bill, to allege that the drawer thereby requested the drawee to pay so much money to the bearer; in the statement of such a note, that the maker thereby promised to pay such a sum to the bearer. Vere v. Lewis,
3 Term Rep. 183. Minet v. Gibson,
Id. 485. Collins v. Emmett, Bl. Term Rep. C. B. 313.

OR in such a case, the plaintiff may state all the special circumstances, and if the verdict correspond with them, he will be entitled to recover.

R

THUS,

Collins v.
Emett.

THUS, where the plaintiff stated that the defendant, on the 5th of April, 1788, drew a Bill of Exchange, directed to Livesay and Co. by which he required them, three months after date, to pay to *Mr. George Chapman or order*, 1,551l. value received, and delivered the said bill to them, and "authorised them to negotiate and indorse the same in the name of George Chapman, and thereby to raise money thereon," for the use of the said persons so using the names, style, and firm of Livesay and Co. and then averred, that when the said bill was so made as aforesaid, or at any time afterwards, "there was no such person as George Chapman, the supposed payee" in the said Bill of Exchange, "but that the said name was merely fictitious," to wit, at London, &c. which said Bill of Exchange afterwards, to wit, &c. by one "Andrew Goodrick, being a person thereunto in that behalf lawfully authorised by Livesay and Co. upon sight thereof was accepted," according to the usage and custom aforesaid. And the said persons so using the names of Livesay and Co. being so authorised as aforesaid, afterwards, and before the payment of the sum of money therein contained, or of any part thereof, and before the payment of the sum of money therein contained, or of any part thereof, and before the time thereby appointed for such payment, to wit, &c. "negotiated indorsed the said Bill of Exchange, in and with the name of the said George Chapman, and by that indorsement, in the name of the said George Chapman, appointed the contents
of

of the said Bill of Exchange to be paid to the said plaintiffs, and thereby raised money thereon, for the use of the said persons so using the names, &c. of Livesay and Co." and then and there delivered the said Bill of Exchange so indorsed to the said plaintiffs, "who, thereupon, on the credit thereof, advanced to the said persons," so using the name, &c. of Livesay and Co. the sum of money in the bill mentioned.

THE circumstances stated in a special verdict on this case were these, that Emmett, who was a partner with Livesay and Co. in the spinning of cotton at Clithero, wrote his name on a piece of blank paper, with a shilling stamp on it; and delivered it to Livesay and Co. for the purpose of drawing a Bill of Exchange, for such sum, payable at such time, and to such person or persons as they should think fit.

THAT Livesay and Co. on the 5th of April, 1788, drew on this paper, above the name of Emmett, a certain writing, directed to Livesay and Co. in the words and figures following, viz. *Clithero*, April 5, 1788. £. 1,551. Three months after date pay to *Mr. George Chapman or order*, fifteen hundred and fifty-one pounds, value received, as advised, John Emmett." That the occasion and manner of giving this paper writing were as follow: on the 5th of April, Livesay and Co. were indebted to Thomas Jeffery in the sum of 1,512l. 9s. on a Bill of Exchange, which became due that day, and which had been previously given for goods sold by Jeffery to them. One

Richard

Richard Collis, clerk to Jeffery, on that day applied to the house of Livesay and Co. for payment of that bill; he there saw Anestie, one of the partners, who informed him that they could not conveniently then pay the money, but requested him to take a bill on their house for the sum, at three months date, and the interest in the mean time, and gave him the blank paper above mentioned, with the name of Emmett written on it, to be filled up by one of the clerks of the house.

THAT one Ludlow, a clerk of Livesay and Co. filled up the paper in the manner as above set forth; that immediately afterwards it was carried to Andrew Goodrick, another clerk of the house, who was authorised by Livesay and Co. to accept it, which he accordingly did, in the names of Livesay and Co. that with the authority of Livesay and Co. the name of George Chapman was then indorsed on the said paper writing, which being so filled up, accepted, and indorsed, was then delivered to the said Collis, who then delivered up the bill for 1,512l. 9s. to the said Livesay and Co. That the said Thomas Jeffery afterwards negotiated the said paper writing with the plaintiffs, and received the full amount from them, only deducting a discount, at $4\frac{1}{2}$ per cent. That the same was duly presented for payment to Livesay and Co. who refused to pay it, of which Emmett had due notice. That there was no such person as George Chapman, the supposed payee of
of

of the said paper writing, being merely fictitious ; that Emmet gave no further or other authority than as before set forth, and knew nothing of this transaction. That the plaintiffs had then no knowledge that the said George Chapman was a fictitious person, or of the circumstances under which the said paper writing was drawn, accepted, and indorsed, but that the said Thomas Jeffery had full knowledge of the whole of the said transactions.

IN pronouncing the judgment of the Court of Common Pleas on this case, Lord Loughborough said, the special circumstances above stated in the declaration, would, in his opinion, have been sufficient to have entitled the plaintiff to recover, if the case stated in the special verdict had not, in two or three instances, varied from them.

A BILL or Note payable to the order of a man, may, in an action by him, be stated as payable to himself, for that is its legal import : or it may be stated in the very words of it, with an averment that he made no order.

IF a note purport to be given by two, and be signed only by one, a declaration generally as on a note by that one who signed it will be good ; for the legal operation of such a note is, that he who signed it promised to pay. Semb. 1 Bur. 323.

ON a note to pay jointly *and* severally, a declaration against one in the terms of the note will be good. Burchell v. Slocock,
2 Ld. Raym. 1545.

R 2

WHERE

Butler v.
Maliffey,
Str. 76.
Neale v.
Ovington,
2 Ld. Raym.
1544.
2 Str. 819.

WHERE a note is given by two, to pay jointly *or* severally, the payee must sue both or either; if he sue both, he may declare on the note in the words of it jointly *or* severally: but if he sue either of them singly, it was formerly held that he could not declare in that way, but that he must state the note as given only by one, and that the joint *or* several note would be good evidence to support such a declaration.

Rees v.
Abbot,
Cowp. 832.

BUT the doctrine in the latter case has been since overruled, and it is now held, that in an action on a joint *or* several Promissory Note, against one, a declaration that he and another made their Promissory Note, by which they *jointly or severally* promised to pay, is good: for *or* must be understood as a disjunctive, the election whether the note shall be joint or several, is in the person to whom it is given, and by suing one, he shews his election to consider it as a several note: but in this case, the true construction of the word *or* is, that it is synonymous with *and*. They both promise that *they or one* of them shall pay; therefore the liability is on *both*, and on *each*. The nature of the transaction forces this construction.

Ibid. per
Buller, J.

AND if the note had been joint only, and it had been stated as a several one, no advantage could have been taken of this but by a plea in abatement.

1 Str. 22.

WHERE the payment of a bill or note is limited at a certain time after the date, it must be stated as being made on the day of the date,

date, that it may appear on the face of the declaration, at what time it became due ; if the bill have no date as on the day when issued, or the first day the plaintiff had knowledge of its existence ; for an instrument not dated 2 Ed. Raym. 1082. must be considered as dated at the time of the delivery.

BUT in stating the bill or note, it is not 2 Show. 422. necessary to allege that it bore date, though that be generally done ; it is sufficient that the date appear by implication, which it does from the allegation, that on such a day the drawer made the bill or note.

IT must be alleged, that the bill or note was made at some certain place : if the action be on a bill dated abroad, that must be the place where it was actually made ; but where it is necessary to prove, at the trial, the making of the bill, which is only in an action against the drawer, then in strictness that place in England or Wales where the action is laid, ought to be subjoined under a *videlicet*, in deference to the ancient rule of pleading with respect to the *venue* : by the precedents, however, that strictness seems now to be disregarded, and the place of the *videlicet* supplied in a subsequent part of the declaration, by an allegation that the drawer had notice of the default of the drawee at the place where the action is laid, or that he there undertook to pay. Vid. Morg. Prec. 47.

INLAND Bills and Notes may be stated to have been made at any place where the plaintiff chooses to lay his action, because the action

tion on them is transitory, and may be stated to have arisen any where.

Bailey 54-

BUT it is said, that "on a bill dated at any place in England or Wales, and payable abroad at usance, the bill should be stated to have been made at the place where it bears date; for what reason this should be done in this case, any more than in any other, does not appear: if the usance between any place abroad and the different towns of this country differed, it might be supposed that exactness in stating the very place from whence the bills bears date might be material to ascertain what the usance is; but as the usance between other countries and any one place in the kingdom is the same as between those same countries and any other place, that reason fails: it would also fail, if the usance varied as reckoned from different places of this kingdom to the same place abroad; for it is an established rule, that where a bill is payable at usance, it must be averred what that usance is, because usances differing according to the places between which they are reckoned, the court cannot in any instance take notice *ex officio* what they are; and that averment ascertaining the time when the bill is payable, it seems immaterial from what place the bill is stated to be dated.

Buckley v.
Campbell,
1 Salk. 13.

Ereskin v.
Murray,
2 Ld. Raym.
1542, 1543.
Taylor v.
Dobbins,
M. 7. G. 1.
B. R. 2.
Ld. Raym.
1543.

IN stating the drawing of a bill or note, it is unnecessary to say that the drawer subscribed it with his own hand writing, though that is generally done; the allegation that he made his Bill of Exchange or Promissory Note, and, in

in the case of the former, that he directed the bill to the drawee, by which he requested him to pay, and in the case of the latter, that by such note he promised to pay, sufficiently implies that his name was somewhere on the instrument, and that he or somebody by his authority wrote it; otherwise it could not with propriety be said that he requested in the one case or promised in the other.

If the bill was in fact drawn by a servant, by the authority of a master, it is sufficient to state it as drawn by the master himself, unless the subscription be alleged, and then it must be stated according to the truth of the case, that the servant, by the authority of his master, drew and subscribed the bill on his master's account.

THE same observations apply to the case of an indorsement or acceptance by the servant, by the authority, and on the account of his master.

WHERE partners are concerned in the drawing, negotiating, or accepting of a bill or note, the usual way of introducing the partnership is to mention it by way of inducement, and to state that one of them, according to the custom of merchants, subscribed, accepted, or indorsed the bill for the partnership account: but the allusion to the custom is not absolutely necessary; nor is it absolutely necessary that it should be directly charged that the partner acting for the rest subscribed, accepted, or indorsed for the partnership; it is sufficient if, on the whole, it appear to have been so.

WHERE

Elliot v. Cooper,
2 Ld. Raym.
1376.

Vid.
12 Mod. 346.

12 Mod. 564.

Vid. Morg.
Prec. 43.

ab. 2 Ld.
Raym. ac.
1484.

Effington v.
East.
2 Ld. Raym.
810
1 Salk. 130.
Wegervlose
v Keene,
1 Str. 224.

WHERE a bill is drawn in sets, and the action is brought on the first, the usual way of stating the request to the drawee is, "that he requested him to pay that first of exchange, (second and third not paid) following the very form of the bill;" and then it is not necessary, in the subsequent part of the declaration, to aver that the second and third were not paid, for if either of them was paid, that would be a sufficient defence at the trial.

DELIVERY being necessary to give the bill an operation, it must be stated that the drawer delivered it to the payee.

Vid. page
109, 110.

As the holder, in order to entitle himself to recover against the drawer or indorser, is not bound to present the bill for acceptance, when it is payable at a certain time after the date, so in that case it is not necessary to state any acceptance: but if it was payable at a certain time after sight, it is necessary to state that the bill was presented for acceptance, and, if the truth will permit, that it was accepted; or that the drawee could not be found, or refused to accept.

Ereskine v.
Murray.
2 Str. 817.
2 Ld. Raym.
1542.

IN an action against the acceptor, it must be alleged that he accepted the bill, for the acceptance is the foundation of the action; but the manner of acceptance needs not to be alleged.

AND if the acceptance be alleged generally without any specification of time, evidence of acceptance after time of payment will maintain the declaration, though the acceptance be
alleged

alleged to have been according to the tenor and effect of the bill, for this shall be construed as a general promise to pay the money, and the words "according to the tenor and effect of the bill" shall be rejected as surplusage; but if the acceptance be alleged to have been *before* the time of payment, perhaps evidence of an acceptance after will not do.

1 Ld. Raym.
364, 365,
574, 575.
1 Salk.
127, 129.
Carth. 459.

IF the bill or note was payable to order, and the action by an indorsee, such indorsements must be stated as to shew his title; an indorsement by the payee must at all events be stated, because without that, it cannot appear that he made any order, on the existence of which depends the title of the indorsee. If the first indorsement was special, to any person by name, in an action by an indorsee after him, his indorsement must for the same reason be stated: so also must all special indorsements.

BUT if the indorsement was in blank, and the action be against the drawer, acceptor, or payee, no other indorsement is necessary to be stated than that of the payee: in an action against a subsequent indorser, his indorsement at least must be added: in an action on a bill or note payable to bearer, no indorsement needs be stated, because it is transferable without indorsement.

Vid page 89,
90, 95.

As a bill may be negotiated at any time after it issues, it is immaterial on what day the indorsement is stated to have been; but if it be stated to have been before the time the bill or note became due, an indorsement afterwards

Vid. *supra*.

will

will probably be considered as a variance. It is not assential to state a delivery by the indorser ; that he indorsed the bill or note, implies that he delivered it.

Rushton v.
Alpinall,
Doug. 679,
(54.)

IN an action against the drawer or indorser of a bill, or against the indorser of a note, it is absolutely necessary, on account of non-payment of the bill or note, to state a demand of payment from the acceptor of the bill or the maker of the note, and due notice of refusal given to the party against whom the action is brought ; for these circumstances are absolutely necessary to entitle the plaintiff to maintain his action ; and a verdict will not help him on a writ of error : the general rule of pleading in this case is, that where the plaintiff omits altogether to state his title or cause of action, it is not necessary to prove it at the trial, and therefore there is no room for presumption that there was actual proof ; where a demand on the acceptor, or notice to the defendant, are not laid, there is no necessity to prove them ; and if it were to be presumed that they were proved, no proof can make a good declaration, which contains no ground of action on the face of it ; and though it be alleged that the defendant promised, that will not help the case : the promise is an inference of law, and the declaration must contain premises from whence that inference may be drawn.

BUT if the title be only imperfectly stated, with the omission only of some circumstances necessary to complete the title, they shall after

ter a verdict be presumed to have been proved; and in some cases no advantage can be taken of the want of them on a general demurrer.

THUS due notice of the dishonour of a foreign bill can only be by protest; yet the omitting to allege a protest in the declaration is only matter of form; notice being alleged generally, it shall be presumed to have been given with all the necessary formalities, and if these be not proved at the trial, the plaintiff cannot recover.

Salomons
v Stavelly,
B. R. M. 24
G III.
Doug. 684
in the notes.

IT is not necessary, in an action against an indorser, to state that the indorsee demanded the money of the drawer of the bill, or the first indorser of a note, because such demand is not necessary to be made in order to complete the title of the indorsee.

Vid. ante,
page 119,
120.

WHETHER the drawer of the bill, or the indorser of a bill or of a note, receiving the bill or the note in the regular course of negotiation before it has become due, can maintain an action on it, against the acceptor or maker, in the character of indorsee, seems undecided; no case of that kind is reported in any book that I have had an opportunity of consulting: that such actions have been brought has been incidentally said from the bench: there seems no good reason why they may not be maintained: but the only case in which it is directly held, that the drawer may maintain an action in the character of indorsee, is no authority to establish this point: for there it appears that the bill was protested for non-payment before the indorsement; and a more

Per J. Ash-
hurst, Tr.
14 G. III.
Louviere v.
Laubray,
10 Mod. 39.

Beck v.
Robley Tr.
14 G. III.
B. R. Bl.
Term Rep.
C B. 89
recent in the notes,

recent case, determined on principle, clearly shews that a drawer or indorser cannot maintain an action against the acceptor in the character of indorsee, where the indorsement is after the refusal of payment ; because, when a bill is returned unpaid, either on the drawer or indorser, its negociability is at an end.

Vid.
Symonds v.
1 Willf. 185.
Vid. Morg.
Prec. 43,
44, 50.

THE action, therefore, in which the drawer or indorser, after payment of the money in default of the acceptor, may recover the first against the acceptor, and the latter against any of the preceding parties, must be brought in their original capacity as drawer or indorser, and not as indorsee.

IN this action, after stating the drawing of the bill, the delivery, the necessary indorsements, the presentment for acceptance, and the acceptance or refusal to accept, it must be further stated, that at the proper time it was presented to the acceptor for payment, who refused, or that the acceptor could not be found ; and if on a foreign bill, a protest for non-payment may be stated ; then that it was returned to the plaintiff, and that the defendant had notice of the premises.

1 Willf. 185.

Vid. Morg.
Prec. 44.

IT may also be stated, that the plaintiff paid the contents of the bill, and, in the case of a protest, the costs, interest, and damages arising from the delay ; but this does not seem absolutely necessary ; that the bill was returned to the plaintiff implies payment by him.

ONE who has indorsed a bill or note cannot, in general, maintain an action on a re-indorsement to him, against the party to whom he indorsed it.

BISHOP

BISHOP declared, on a Promissory Note, made by one Collins, payable to Bishop or order, and afterwards indorsed by him to the defendant Hayward, who afterwards re-indorsed it to Bishop. On the general issue a verdict was given for the plaintiff: a motion was made in arrest of judgment, on the ground that there was no cause of action stated on the record. The court observed, that the consequence of supporting this verdict would be, that the plaintiff, without having any real demand on the defendant, might recover against him by the judgment of the court, without allowing to the defendant a possibility of defending himself. That on the trial it was only necessary for him to prove that the note in question was given, as stated in the declaration, payable to the plaintiff; that it was indorsed by him to the defendant; and re-indorsed by the latter to the plaintiff. The defendant could not deny these facts, and on proving them he had proved his whole declaration, and therefore entitled to a verdict.—But the court were bound to see whether, on his own statement of the case, the plaintiff had shewn sufficient to entitle him to judgment. There might be circumstances, which, if disclosed on the record, might entitle the plaintiff to recover against the defendant on this note, as if he had stated that his own name was originally used for form only; and that it was understood by all the parties, that the note, though nominally made payable to the plaintiff, was in reality to be paid to the defendant; but then the note should have been declared on according to its legal import.

Here

Here nothing appeared but that the plaintiff, being the original indorser of the note, called on the defendant, who appeared on the record to be a subsequent indorsee. Nothing could be clearer in law, than that an indorsee might resort to any of the preceding indorsers for payment; but the present action was an attempt to reverse this rule. The court could in this case presume nothing that was not stated on the record; the cases where presumption was admitted were where the plaintiff stated a title defective in form, not where he had shewn a title defective in itself, which was the case here.

Bishop v.
Hayward,
4 Term Rep.
470.

Vid Smith
v. Nissen, 1
Term Rep.
269.

If the drawee, without having effects of the drawer, accept and duly pay the bill, without having it protested, he may recover back the money in an action for money paid, laid out, and expended to the use of the drawer.

Vid. ante,
page 152.

ANY one who has accepted and paid the bill under protest for the honour of the drawer or indorser, may have a special action on the custom against the person for whose honour he accepted and paid. So also may he who has paid under protest for the honour of the acceptor; and if in accepting or paying for the honour of any one, he, who does it, retain the drawer or acceptor, and all others obliged to him in due form of law, he may sue the drawer, acceptor, or any of the prior indorsers.

Starkey v.
Cheefman,
1 Ld. Raym.
538.
1 Salk. 128.
Carth. 409.

It is not necessary, in any action on a Bill of Exchange or Promissory Note, to state an express promise by the defendant; the law implies

implies a promise where the party is liable ; and therefore it is sufficient, after stating the circumstances, to say, that by these he became liable to pay.

BUT it is usual to allege an express promise after stating the liability, that no exception may be taken to the addition of other counts in assumpsit, which are usually added ; for it is said that where the declaration was upon the custom, and likewise on an *indebitatus assumpsit*, the judgment was arrested, which could not have been the case had an express promise been added to the count on the custom, because it is an established rule in pleading, that wherever the same plea may be pleaded, and the same judgment given on different counts, they may be joined in the same declaration.

1 Vent. 153.
Vid. 1 Salk.
24.

1 Term Rep.
276.

INSTEAD of bringing an action on the custom or on the statute, the plaintiff may in many cases use a bill or note, only as evidence in another action ; and where the instrument wants some of the requisites to form a good bill or note, the only use he can make of it is to give it in evidence ; or if the count on the instrument be defective, he may give it in evidence, in support of some of the other counts for money had and received, or money lent and advanced, according to the circumstances of the transaction.

Vid. ante,
page 58.
Tadlock v.
Harris,
3 Term Rep.
174.

A BILL is presumptive evidence of money lent by the payee to the drawer, and a note of money lent by the payee to the maker, and both consequently of money had and received.

Vid.
Grant v.
Vaughan, 3.
Bur. 1516.

Vid 3 Term Rep. 183. ed the use of the holder, whether they be payable to the bearer, or to the order of the payee.

Vid. ante, page 90. HE who transfers a bill or note without indorsement gives no additional credit to the instrument, and therefore he cannot be sued on the instrument itself, nor is liable to answer in any species of action to any holder but him to whom he immediately transferred it, and to him only for the consideration on which it was given, whether for work and labour, goods sold and delivered, money lent and advanced, or any other legal consideration.

Vid. Cham-berlyn v. Delarive, 2 Will. 353. BUT if the party who took the bill or note did not use due diligence to obtain payment from the acceptor or maker, nor give due notice of their default to the party from whom he received it; the latter may either plead, or give in evidence, the bill or note, to an action on the original consideration.

Vid. ante, page 112, 116. THE holder of the bill or note may sue all the parties who are liable to pay the money, either at the same time or in succession, and he may recover judgment against all; if satisfaction be not made by the payment of the money before judgment obtained against all; and proceedings will not be staid in any one action but on payment of the debt and costs in that action, and the costs in all the others in which he has not obtained judgment.

Vid. Vesey, 115. BUT though he may have judgment against all, yet he can recover but one satisfaction; yet

yet though he be paid by one, he may sue out execution for the costs in the several actions against the others.

AND if he have recovered judgment in more than one action, a tender of the principal recovered in one, and the costs in all the rest, will prevent him from taking out execution; and it will be considered as a contempt of the court, if he take out execution against more than one.

Windham
v. Wither.
Idem. v.
Trull,
1 Str. 515

MACDONALD drew a Bill of Exchange for 20l. on Bovington, who accepted it; the bill afterwards came into the hands of Thompson, who recovered judgment against Bovington, and charged him in execution. Bovington having obtained his discharge under the Lords' act in that suit, Thompson sued Macdonald the drawer, and recovered the amount of the bill, on which Macdonald sued Bovington, on his acceptance, and charged him in execution. On a rule to discharge Bovington out of custody, it was contended, that he had satisfied the debt, by being charged in execution, at the suit of Thompson, and that he was not liable to be sued again for the same sum. But the court said, that nothing could be more clear than that this was not a satisfaction of the debt as between these parties, though it was as between the defendant and Thompson: that to the holder it was a mere *formal* satisfaction, and not like actual payment: that the present plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of Thompson, had a right to have recourse to this defendant as acceptor; for that by this

payment

Macdonald
v Bovington,
4 Term Rep.
825.

payment a new cause of action arose against the defendant, without regard to what had passed in the former action.

8.21

THE plea generally pleaded to this action is that of non-assumpsit: but the defendant may, if the truth will warrant him, plead *non-assumpsit infra sex annos*; for by statute 21 Jac. I. c. 16. actions on the case, except upon *accounts* between merchants, must be brought within six years: and by the express provision of the statute of Queen Anne, all actions on Promissory Notes must be brought within the same time as is limited by the statute of James, with respect to actions on the case.

BUT an acknowledgmet of the debt, or a promise to pay, made within six years of the commencement of the action, will take the case out of the statute.

8 W. 3 M.
5 Mod. 314.

TO an action on the case on a Bill of Exchange against the defendant as acceptor, he pleaded, that after acceptance he gave a bond in discharge of it; it was held that this plea was bad, because it amounted to the general issue; for the debt on the bill being extinguished by the bond, the defendant ought to have pleaded non-assumpsit, and to have given the bond in evidence.

2 P. Will.
89, 407.
2 Ask. 107.

IF any of the parties whose names appear on the bill or note become bankrupt, the holder may come in under the commission; and if he have received no part of the money from any of the others, may be admitted to prove the whole sum mentioned, and receive a dividend on the whole.

IF

IF afterwards any of the others become bankrupt, he may prove the remaining sum, and receive a dividend on that.

IF all become bankrupt, before the holder has received any part of his debt, he may prove the whole sum under each commission; and though he afterwards receive a dividend under one, his dividend under a second shall be calculated according to the whole sum originally proved, not on what remains due after deducting the sum received under the first commission; but if the sum so calculated exceed the sum remaining due, he shall only receive so much as is equal to that remaining sum; the same rule is to be observed with respect to the calculation of the dividend under each commission, till the holder shall have received 20s. in the pound on his whole debt.

1 Atk. 210.
2 Vef. 144.
115.

THE general rule with respect to debts carrying interest, in case of bankruptcy, is that all interest ceases from the date of the commission; but if there be an estate sufficient to pay twenty shillings in the pound, and a surplus, interest shall then revive, and be paid up to the final discharge of the debt.

1 Atk. 75a.
244.

IF a man accept a bill without consideration, and the drawees, after negotiating it, become bankrupts, and the holder, instead of coming in under the commission, choose to resort to the acceptor for the whole sum, which he pays after the bankruptcy, this is such a debt as the acceptor cannot prove under the commission, and he may therefore recover against the drawers, notwithstanding their certificate.

Vid Chilton
v. Wiffen &
Cromwell,
3 Will. 13.

Vid. Howis
v. Wiggins
4 Term Rep.
124.

tificate. So if the payee of a Promissory Note pay the amount of it to an indorsee, after the bankruptcy of the maker, he may recover against the maker, notwithstanding his bankruptcy and certificate.

C H A P. IX.

Of the Proof necessary at the Trial, and of the Defence that may be set up there.

A GREAT part of what may be said under this head necessarily rises out of the general doctrine explained in the preceding chapters, and will therefore in substance be little more than a repetition, though different in form.

THE plaintiff must in all cases prove so much of what is necessary to entitle him to his action, and of what must be stated in his declaration, as is not from the nature of the thing and the situation of the parties necessarily admitted.

IN an action against the acceptor, it is a general rule that the drawer's head is admitted, because the acceptor is supposed to be acquainted with the writing of his correspondent, and by his acceptance he holds out to every one who shall afterwards be the holder, that the bill is truly drawn: it has indeed been lately

5 Ed. Raym.
444. Jenys
v. Fowler,
Str. 946.
Price v.
Neal. 3 Bur.
1354. 1 Bl.
390.

lately suggested from high authority, that this rule has probably not been established on the most mature consideration, and that if it should ever come to be the subject of future discussion, there might be some reason to alter it; cases, it was said, might be imagined, where the knowledge of the drawer's hand might more naturally be supposed in other parties than in the drawee: that the payee generally received the bill from the drawer, who was his correspondent, and that therefore the presumption was, that he knew as well as the acceptor, or perhaps better, whether the bill was in fact drawn by the person by whom, on the face of it, it imported to be drawn, and that from the privity between them, the same knowledge might be imputed to his assignee. But these observations seem by no means satisfactory. By accepting a bill, the drawee evidently shews, that he has no doubt of its being in the hand of the person appearing as the drawer; he may have had advice of an intention to draw upon him; he may have effects of the drawer in his hands, or he has some good reason for honouring his bills; the payee, on the contrary, may in many cases be entirely unknown to the drawer; the bill may have been remitted to him by a correspondent, whose name does not appear upon it; or if in fact the remitter be the payee, who of course knows the drawer's hand, he cannot, along with the bill transmit that knowledge to the indorsee, who is the person that

Ld. Thurlow
in the House
of Lords, in
the case of
the fictitious
indorse-
ments.

has

has it presented for acceptance ; much less can any of the subsequent holders be supposed to have any knowledge of the hand of the drawer ; it would therefore be productive of much inconvenience, if in an action against the acceptor, the plaintiff were to be held to the proof of the drawer's hand : on the event of the bill's not being really drawn by the person whose name appears upon it as the drawer, the true question is, *to whom* is negligence or want of caution to be imputed ? to the *holder*, who in most cases, if he has any knowledge of the drawer's hand, has that knowledge from accident, and not from the nature of the transaction ? or to the *acceptor*, who, by his acceptance, impliedly tells the person presenting it, that he undertakes for the bill's being a true one ? To the *acceptor* certainly. And therefore, if the bill be in fact forged, 'tis he who must sustain the loss.

Vid. Price
v. Neal,
3 Bur. 1354.

IN an action against the acceptor, therefore, where the acceptance was on sight of the bill, whether in writing on the bill or by parol, it is not necessary to prove the hand writing of the drawer. But if the acceptance was without sight of the bill, the acceptor is not precluded from disputing the hand of the drawer ; if in truth the hand writing of the latter was forged, the acceptor could not set off, in account with him, the money paid on that bill ; and as he did not see the bill at the time of acceptance, he has not entered impliedly into any engagement, that the very bill on which the suit is founded, was drawn by his correspondent, and consequently no negligence

Vid. page 72.

negligence can be imputed to him, in not having taken due precaution to be satisfied that the bill was in the hand-writing of the drawer: in such a case, therefore, it is necessary that in an action against the acceptor, the signature of the drawer should be proved: that of the acceptor himself must of course be proved; and that of every person through whom the plaintiff, from the nature of the transaction, must necessarily derive his title.

ON a bill payable to bearer, there is no person through whom the holder derives his title; in an action against the acceptor, therefore, he has only to prove the hand-writing of the acceptor himself. Vid. page 88, 89.

BUT to a bill payable to order, the holder can have no title, unless the payee have actually expressed his order by indorsement. The engagement of the acceptor is not to pay to every one who shall happen to be the bearer, but to those only who shall be entitled by the order of the payee: It has therefore long been a general rule, that in an action against the acceptor of a bill payable to order, the plaintiff must prove the hand-writing of the payee or first indorser: if his indorsement be special to another person," or to "another, or his order," the same rule, on the same principle, applies to the indorsement of that other person, as it does to the indorsement specifically made of every subsequent indorser, between the payee and plaintiff. If the indorsement of the payee be general, the proof of his hand-writing is sufficient; that of any other of the indorsers is not requisite, though all the subsequent

quent indorsements be stated in the declaration; for by indorsing generally, the payee has shewn his order to be, that the bill should be payable to any subsequent holder; and accordingly it has been shewn, that any

Vid. page 89.

BUT the plaintiff, in the case of a transfer by delivery, which may be either when a bill is payable to bearer, or when a bill payable to order is indorsed blank, may be called upon to prove that he gave a good consideration for it without the knowledge of its having been stolen, or of any of the names of the blank indorsers having been forged.

Miller v.
Race,
1 Bur. 452.
Peacock v.
Rhodes,
Doug. 633.

Hankey v.
Wilfon.
Sayer 223.

NOTWITHSTANDING this general rule, that in an action against an acceptor of a bill payable to order, the hand-writing of the first indorser must be proved at the trial, a case is reported, where it is said to have been held, that such proof is not always necessary: by the report it appears, that it was proved that the defendant had accepted the bill; that there was no *actual* proof, that the name of *one* of the indorsers was of his hand-writing; that the name of *that* indorser, and those of all the other indorsers, was upon the bill at the time of the acceptance, and *that at that time the defendant promised to pay the bill*: this evidence was left to the jury, who found a ver-

dict

dict for the plaintiff. The question being agitated, whether, upon this evidence, the matter ought to have been left to the jury, the court held that it ought, and are reported to have expressed themselves thus: "It is in general necessary to give actual proof, that the name of every indorser is of his hand-writing; but it is not necessary to do this in every case: in the present it was a matter proper for the determination of the jury, whether the acceptance of the bill, when the names of all the indorsers were upon it, *together with the promise of the defendant to pay it*, did not amount to an *admission*, that the name of every indorser is of his hand-writing, that admission superseding the necessity of actual proof."

BUT the authority of this case appears to be very doubtful; unless all the indorsements were special, which they are not stated to have been, the general rule as laid down by the court extends too far; the report, therefore, is at least inaccurate. It is difficult to conceive how a promise to pay the bill, made at the time of the acceptance, can be considered as an admission of the hand-writing of the indorsers; and it has been lately decided that such admission is not to be presumed from the circumstance of the indorsements being on the bill at the time of the acceptance. The acceptor only looks on the face of the bill, which purports to be in the hand-writing of the drawer, which he is therefore precluded from afterwards disputing; he never looks, or at least is not supposed to look,
at

Smith v.
Chester,
1 Term Rep.
654.

at the back of the bill ; and if he did, he cannot be presumed to admit the hand-writing of the indorsers, because his privity is not with them, it is only with the drawer.

d. ante,
§ 75, 76. WHERE the acceptance is conditional, the event on which the condition depends must be proved to have taken place before the commencement of the action.

l. Collins
metz, Bl.
m Rep. IN an action by an indorsee against the drawer, the same rules obtain with respect to proof of the hand-writing of the indorsers, as in an action against the acceptor.

page THAT of the drawer himself must of course be proved : It must also be proved, that the plaintiff has pursued that diligence with respect to the drawee, and given such notice to the drawer, of the default of the former, as are shewn in a former chapter, to be necessary on his part to entitle him to have recourse to the latter.

FROM the rule that, in an action against the drawer or acceptor of a bill payable to order, there must be proof of the signature of the first indorser, and of all those to whom an indorsement has been specially made, has arisen the question which has so long agitated the commercial world on the subject of indorsements, in the name of fictitious payees.

A BILL payable to the order of a fictitious person, and indorsed in the fictitious name, is not a novelty among merchants and traders. A case of that kind appears to have been brought to trial upwards of twenty years ago.

It

It was an action by the indorsee against the acceptor of a Bill of Exchange, payable to Butler and Co. and their order, and indorsed in that name. The plaintiff was so far from proving it to have been indorsed by any persons using that firm, that his own witnesses said, they believed it was indorsed by Cox the drawer. It also appeared, that there was a house of Butler and Co. with whom Cox had dealings, but it was proved that the bill in question had never been in their hands; it was admitted that the bill was a true one, and that the defendant had regularly accepted it; it appeared further, that the acceptor had *expressly promised to pay*, at the time the holder had discounted the bill; but it was insisted, that the indorsement being fictitious, the plaintiff had failed in making out an essential part of his title. Lord Mansfield observed, that the intent of the bill was only to enable Cox to raise money, and the reason why it was not made payable to his order, was, that there were other bills at that time payable to his order, and if this had been so too, there would have been too many in the same name in circulation at the same time, which would have had the appearance of fictitious credit; that names were often used of persons who never existed; the defendant, by his acceptance, *and promising expressly to pay the bill*, had enabled Cox to put it in circulation, and having so done, he should not avail himself of an objection that the plaintiff had not completely made out his title.

3 Term Rep.
176.

BUT in the years 1786, 1787, and 1788, two or three houses, connected together in trade, entering into engagements far beyond their capital, and apprehending that the credit of their own names would not be sufficient to procure currency to their bills, adopted, in a very extensive degree, a practice which before had been found convenient on a smaller scale. So long as the acceptors or drawers could either procure money to answer their bills, or had credit enough with the holder to have them renewed, the subject of these fictitious indorsements never came in question. But when the parties could no longer support their credit, and a commission of bankruptcy became necessary, the other creditors felt it their interest to resist the claims of the holders of these bills, and insisted that they should not be admitted to prove their debts, because they could not comply with the general rule of law, which requires proof of the hand-writing of the first indorser. The question came before the Lord Chancellor, by petition : He directed trials at law, and several have been had ; three against the acceptor in the King's Bench, and one against the drawer in the Common Pleas ; though not all expressly by that direction.

IN the first case against the acceptor, besides the general counts for money *paid* by the plaintiffs to the defendant's use, and *money had and received* by the defendant to the plaintiff's use, there were also two special counts laid on the bill itself : The first was in the terms of the bill, " that the defendant
and

Tarlock v.
Harris,
3 Term Rep.
174

and others drew a Bill of Exchange on the defendant, payable to *Grigson and Co.* or order, three months after date, which the defendant accepted; and that Grigson and Co. indorsed it to Lewis and Potter, who indorsed it to the plaintiffs." The second count stated it to be "a bill drawn as above, in favour of certain persons trading under the firm of Lewis and Potter, or order, and indorsed by Lewis and Potter to the plaintiffs."

THE circumstances proved at the trial were these:

THAT there was a house of trade at Nottingham under the firm of Harris, Harris, and Plant, of which the defendant was one of the partners, and that the defendant *alone* carried on business in Wood-street, and resided in London; that the body of the bill, as well as the signatures of the drawers and acceptor, were in the hand-writing of the defendant; that no such house of trade as that of Grigson and Co. was concerned in the transaction, but that the defendant had drawn the bill payable to Grigson and Co. at the request of Lewis and Potter; that the indorsement in the names of Grigson and Co. was fictitious, and that before the bill became due the defendant knew that to be the case, but it did not expressly appear whether he knew it at the time the bill was drawn; that the indorsement of Lewis and Potter was in the hand-writing of one of the partners of that house, and that they received the bill from the defendant and delivered it to the plaintiffs: that the value of the

the bill was paid to the house of Lewis and Potter in draughts on bankers, which were afterwards paid in cash; and that the defendant had credit given him in account with the house of Lewis and Potter for the value of the bill.

To this evidence the defendant's counsel demurred, as not supporting any count in the declaration.

LORD KENYON, in giving the opinion of the court, said, that in deciding on this particular case they did not wish to have it understood that they meant to infringe on the rule as applicable to cases in general; for that generally speaking there was no doubt but the indorsee of a Bill of Exchange, payable to order, must, in deriving his title, prove the hand-writing of the first indorser. But that this decision proceeded on the special circumstances of this particular case, that the defendant, at the time of entering into this engagement, knew there were no such persons as Grigson and Co. and therefore that in point of formal derivation of title, that which is usually done could not be done in this case. That, on the first count of this declaration, the opinion of the court did not proceed, neither was it necessary to say any thing on the second; though if it had been necessary to resort to that, he himself had an opinion on it. But the counts on which the judgment of the court was given, were those for *money paid; and money had and received*. In Lord Raymond's time it had been decided, that a general *indebitatus assumpsit* might be maintained to recover money for the value of a Bill

Ed. Kenyon,

Ward v.
Evans,
& Ld. Ray-
mond, 930.

Bill of Exchange which was not paid. That case, indeed, had been on a bill payable to bearer, but the doctrine of that case was a sufficient foundation for the opinion of the court in the present, and had been recognized in a subsequent case by each of the judges of this court, "That to give such a bill is, as it were, an assignment of so much property, which becomes money had and received, to the use of the holder of the bill. Here the defendant, being a debtor to the house of Lewis and Potter, drew a bill, which he delivered to them, and drew it in terms which could not be proved in a formal manner: He was not only privy to the transaction, but the very negotiator of it; and by drawing it, he put himself in a *situation* to pay, what he was in conscience *bound* to pay; therefore it was an *appropriation* of so much money to be paid to the person who should become the holder of the bill." Grant v. Vaughan.

IN the next case, the first count stated the Bill of Exchange to be drawn by Livesay and Co. on the defendants, in favour of Lawrence Ashworth, who was also a fictitious person, and by him indorsed to the plaintiffs. The second count stated the bill to be payable to the *bearer*; the third payable to the order of the drawers, and indorsed by them to the plaintiffs; then followed the money counts. Vere v. Lewis,
3 Term Rep.
183.

AN attempt was made on behalf of the defendants to distinguish this case from the former, because there was no evidence that, in point of fact, they received any value for the bill,

Ld. Kenyon
C. J. Ashurst
J. & Buller J.

bill, and that therefore they could not be liable on the *money* counts: But the count said, that the acceptance of the defendants was alone evidence that they had received value from the drawers, and that on the demurrer to evidence, the court might draw the same inference which would have been drawn by the jury. Three of the court also *thought*, that the plaintiffs might recover on the second count, which stated the bill as drawn payable to bearer.

Minet v.
Gibson,
3 Term Rep.
483.

THE next case against the acceptor having also a count, in which the bill was stated to be drawn payable to bearer, and the court being of opinion that it was decided by the last, gave judgment for the plaintiff without hearing any argument, and added, they understood it had been agreed to turn it into the shape of a special verdict, that it might be carried up to the House of Lords.

Collins v.
Emert, Bl.
Term Rep.
C. B. 313.

ON the authority of these two last cases against the acceptor in the King's Bench, was decided the case against the drawer in the Common Pleas, the circumstances of which are stated at full length in the last chapter, judgment being given for the plaintiff on the count which stated the bill as being drawn payable to bearer.

THE case of Minet and Gibson after having been solemnly argued before the House of Lords, was at last decided in favour of the holder of the Bill by the opinion of a majority of the judges. The circumstances stated in the special verdict were these:

LIVESAY and Co. made a certain instrument in writing, directed to the defendants, requiring

requiring them, three months after date, to pay to J. White, or order, 721l. 5s. Livesay and Co. knew, at the time of making it, that no such person existed as J. White, mentioned in the bill; an indorsement in writing was afterwards made by Livesay and Co. purporting to be the indorsement of J. White, and requiring the contents of the bill to be paid to Livesay and Co. or their order: Livesay and Co. afterwards indorsed (by A. Goodrich, by procuration of Livesay and Co.) to the plaintiffs for a full and valuable consideration, when the plaintiffs became the holders of the bill; the defendants afterwards accepted, with the full knowledge that no such person as J. White, mentioned in the bill, existed, and that the name of J. White, so indorsed thereon, was not in the hand-writing of any person of that name. The defendants at the time of making and accepting the bill had not, nor had they at any time since, any money, goods, or effects, of or belonging to Livesay and Co. or of the plaintiffs, in their hands.

BESIDE the money counts, the declaration contained seven special counts on the bill. The first stated that Livesay and Co. made a Bill of Exchange, directed to the defendants, requiring them, three months after date, to pay 721l. 5s. to John White, or order; Livesay and Co. well knowing that no such person as J. White existed; on which bill an indorsement was made purporting to be the indorsement of J. White named in the bill, requiring the contents to be paid to Livesay and Co.

or

or order; that Livesay and Co. (by one Absalom Goodrich, by procuration of Livesay and Co.) indorsed to the plaintiffs; and that the defendants accepted it, knowing that no such person as J. White existed; and that the name of J. White so indorsed was not the hand-writing of any person of that name.

THE second count, after stating the drawing of the bill, as in the first, proceeded thus: Livesay and Co. knowing that J. White was not a person dealing with, or known to Livesay and Co. and using the name of J. White on the bill as a *nominal* person only, and intending not to deliver the same to him, or to procure the same to be actually indorsed by him; on which bill a certain indorsement was made, requiring the payment to be made to Livesay and Co. and that Livesay and Co. indorsed to the plaintiffs, without having delivered the bill to J. White, and without any actual indorsement or assignment of the bill by White.

THE third count stated, that the bill was made payable to themselves, Livesay and Co. by the name and description of J. White.

THE fourth treated it as a common bill, payable to J. White, or order, and stated that J. White indorsed it to the plaintiffs.

THE fifth was payable to *bearer*; and that the plaintiffs were the bearers.

THE sixth payable to J. White, or order; with an averment that, when the bill was made, there was no such person as J. White, the supposed

posed payee, but that the name was merely fictitious; by reason whereof the sum mentioned in the bill became and was payable to the bearer thereof, according to the effect and meaning of the bill; averring also, that the plaintiffs were the bearers and proprietors thereof.

THE seventh count stated, that there was a partnership, or house, of certain persons using trade as well in the name and firm of Livesay and Co. as in the name and firm of J. White; that the last-mentioned persons made a certain other bill, (the hand of one of them on their joint account, and in their co-partnership name and firm of Livesay & Co. being there-to subscribed) and directed it to the defendants, requiring them, three months after date, to pay to the said last-mentioned co-partners, by the name of J. White, or order, 721l. 5s. and that the said last-mentioned co-partners afterwards, by a certain indorsement in writing, appointed the contents to be paid to the plaintiffs, and delivered the bill, so indorsed, to them.

ONE observation naturally presents itself to the mind on the inspection of this record: The two first counts state in substance all the circumstances found by the special verdict, yet judgment was given for the plaintiffs, not on one of these, but on the fifth count, which states the bill as payable to bearer: It appears singular that a court of justice should decide, that a man should have a right to recover on a general count, supported by special circumstances given in evidence, and that these very

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-circumstances,

circumstances, when stated specially on the record, should not be considered as sufficient to sustain the action. It seems impossible to account for this apparent inconsistency in any other way than by adverting to the declaration in the case of Vere and Lewis, and the judgment given upon it; in that there is no count which states the circumstances specially; but the court being of opinion that the plaintiff was entitled to recover, thought the count, which stated the bill as payable to bearer, was a sufficient foundation for their judgment; and a like count appearing in the case of Minet and Gibson, they gave judgment on that, without adverting to the two counts, which stated the special circumstances of the case.

THIS inconsistency being pointed out by the counsel for the plaintiff in error, in the House of Lords, as one ground of impeaching the judgment of the court below, it was observed in answer, that there being in fact but one cause of action, the plaintiff could have judgment only on one count, and consequently judgment was necessarily entered for the defendant on all the rest; and if upon the whole record there appeared a sufficient cause of action, but the judgment was entered on the wrong count, the court of error would rectify it.

INDEPENDENTLY of the rule which requires the proof of the hand-writing of the first indorser, one preliminary objection has been made to the holder's right of recovery in any form of action against the drawer or accept-

or:

or : The very act of indorsing on a bill a name which belongs to nobody, is, it is said, in itself a felony ; it has a general tendency to defraud, though the fraud be pointed against no particular individual ; and in all cases which have arisen, has actually defrauded the holder of the bill, by imposing on him the idea of a security which does not exist. The act too of sending the bill into circulation with a fictitious name on it, it is said, is a felony in him who is privy to the transaction.

WHETHER each or either of these acts be in reality a felony admits of considerable doubt ; and is one point on which the opinion of the judges was required by the House of Lords. On the supposition that that opinion was to be given in the affirmative, the advocates on the part of the defendant to the action insisted, that the holder of the bill could not recover against either the drawer or the acceptor, because he could not make title, through the medium of a felony, in another ; that a felony contaminated a transaction, and the civil remedy was completely merged in it by the policy of the law, to prevent, as much as possible, crimes from going unpunished. The case of Peacock and Rhodes, they said, could not be cited in opposition to this doctrine ; for in that case the bill having been regularly indorsed by the payee, and having, though after having been stolen, come to the hands of the plaintiff for a good consideration, he was only under the necessity of proving the hand-writing of the first indorser, and was bound to make no part of his title

Vid.
3 Term Rep.
176. Bl.
Term Rep.
C. B. 319.

Doug. 611.

title through the person who stole the bill : but here the plaintiff deriving his title through the indorsement, which was a forgery, was necessarily barred of his action. To this it was answered, that this proposition with respect to the effect of the felony was not true to such an extent ; it was true, indeed, that a civil action could not be maintained, where the cause of action was grounded wholly on an act of felony ; as if one stole a horse or money, the owner could not maintain trover, or money had and received against him, because the civil remedy was merged in the felony : if the horse came into the hands of another person, under circumstances which would not amount to a change of property, the original owner might recover him from that person ; though, therefore, the felony might be an answer to an action against either the drawer or acceptor, where it appeared the defendant was guilty of the felony, yet that would not preclude the plaintiff from recovering against the other if he did not appear to be guilty.

THE advocates on the other side of the question in the House of Lords, professing not to impeach the judgment of the Common Pleas, in the case of Collins and Emett, in which the defendant was perfectly innocent of the supposed felony, were satisfied to maintain, that where the fact of the felony could be fixed on the defendant, that was a bar to a civil action.

IN a transaction of this kind it is apprehended, that whoever in fact makes the fictitious indorsement, both the drawer and
acceptor

acceptor must in general be guilty of publishing the bill with that indorsement on it, knowing it to be fictitious.

IN such a case, whether this amounts to a felony is certainly a preliminary question ; for though, independently of that question, the plaintiff might be entitled to recover, yet if in fact it shall be decided to be felony, he must necessarily be precluded from his action, because, if he were to recover at all, he must recover against the felon himself.

BUT it may happen that the acceptor may not know that the bill he accepts is attended by any circumstance different from those attending Bills in the usual course of business ; as where the bill is brought him for acceptance by a third person, either before the indorsement is made or afterwards, without intimation of the payee's being fictitious : The drawer too, even in *common* cases, may be so far unaffected with the felony, that he may not be guilty of publishing the bill with a false indorsement on it, knowing it to be false, for it may be carried out of his hands before the indorsement is made : and in some cases, as in that of Collins and Emmet, the person appearing as the drawer may be perfectly ignorant of the transaction.

IN any of these cases, therefore, in which the defendant may appear to have acted without knowledge of the circumstances, the question of felony cannot be considered as preliminary to the decision on the plaintiff's right of action : If the adherence to the rule which requires proof of the hand-writing of

the first indorser be so rigid, that the plaintiff can in *no* form of action recover without it, that is, of itself, sufficient without the intervention of the felony: If an action in *any* form can be sustained, in which that rule may be dispensed with, then it is not through the felony that the plaintiff derives his title, and consequently he cannot be affected by the decision of that question.

If this reasoning be well founded, it follows that whatever that decision might have been, the *general* question was still open to discussion; if in the affirmative, then in those cases only where the defendant is innocent; if in the negative, then in all cases.

3 Term Rep.
178, 181.

IN support of the judgment on the fifth count, which states the bill as being drawn payable to bearer, it had been urged that in stating an agreement or a deed in pleading, it is sufficient to state the legal operation of it, though there might be a verbal variance between that and the instrument itself: as where a lease is made jointly by B. tenant for life of C. and him in remainder or reversion in fee; during the life of C. this may be stated as the lease of tenant for life, and the confirmation of him in remainder or reversion, that being then the legal operation of the deed; and, for the same reason, after the death of C. it may be stated as the lease of the person in remainder or reversion, and the confirmation of B.

Co. Lit.
45, a.

So here, it was said, though the bill appeared on the face of it to be payable to order, yet

Bl. Term
Rep. C. B.
321.

as nobody existed who could give such order, the engagement must be to pay the bill, which was, in effect, to render it payable to the bearer.

If, however, recourse must be had to the intention of the parties, it would seem that it is only in the case of a *blank* indorsement in the name of the fictitious payee, that the bill must be considered as in effect payable to bearer; where the indorsement is *special*, as it was in the present case, the intention to be attributed to the parties is, that it should be payable to the order of him to whose order it is made payable by the fictitious indorsement, and then the third count would have been better adapted to support the judgment than the fifth.

BUT it was objected that this argument was not applicable to the present case; for though it must be admitted that a deed must be stated according to its legal operation; yet that operation must appear on the face of the deed itself, without any collateral circumstances to explain it, *contrary* to the evident meaning of the words.

WITH respect to the joint lease of tenant for life, and him in remainder or reversion, if the several interests which they had in the land did not appear in the deed, yet the operative words of the lease were not of that fixed and determinate meaning that they could not admit of a different construction, if collateral circumstances required it, in order to give them effect: But the words "payable to order" and "payable to bearer" were so peculiarly appropriated to the distinct species of bills

bills in which they were respectively used, that the one could by no possibility be construed to mean the other.

A STILL stronger objection to the judgment's being supported on this count, arises from a question put to the counsel by the Lord Chancellor, "Whether an action could be maintained on this bill against an indorser?" That an action may be maintained against an indorser of such a bill can admit of no doubt: It is, from the frame of it, payable to order, and transferable by indorsement; and in an action against an indorser, no question could arise about the fictitious payee, because, as will be seen hereafter, in that action the plaintiff derives no part of his title, through any of the parties to the bill who precede the defendant: But a bill payable to bearer, being transferable by delivery, cannot regularly be indorsed; and it seems, from the question, to have been supposed that no action could be maintained against the indorser; though no doubt was entertained but that it might, even when it was held, that a bill payable to bearer could not be the subject of an action by the indorsee, against the acceptor or drawer. If, therefore, the judgment were affirmed on this count, it would follow that the same instrument must, in one case be considered as a bill payable to bearer, and in another as a bill payable to order, both of which it cannot be: But the difficulty suggested with respect to the period when the bill shall be said to cease to operate as payable to bearer, and assume the character of a bill payable to order, admits of an easy solution:

olution : As against the drawer and acceptor it operates as the one ; as against the indorser it operates as the other.

So general seems to be the opinion that there ought to be a strict adherence to the rule which has given rise to this question, that the count which states the bill in its own terms, appears to have been abandoned on all sides : The plaintiff's counsel in the case of Tatlock and Harris abandoned it : the advocates on the same side in the House of Lords abandoned it : The Court of King's Bench professed, that on it their opinion did not proceed ; and the Lord Chancellor, in his address to the House on the subject of the questions to be referred for the opinion of the judges, seemed to think it could not be supported by the special verdict.

ONE general objection was made to all those counts which were founded on the bill itself : It is only in favour of the custom of merchants that the practice is founded of declaring on those instruments as specialties ; and if such a bill was not within the custom of merchants, then the plaintiff could not recover on those counts : That such a bill was not within the custom of merchants, it was urged, appeared from this, that in no book on the subject was there to be found any allusion to a bill of this kind ; the usage had provided, and the law had acknowledged two sorts of bills, which were sufficient to answer every purpose of trade, where the parties had no sinister view ; if it was wished to facilitate the circulation of
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the bill, it might be made payable to bearer ; if to confine it within certain limits, it might be made payable to order ; but this was a new invention to enable men to raise money by a fraud, and it could not be pretended that this was within the custom of merchants.

To this it was answered, that the custom of merchants is not to be confined to those particulars which are to be found in any mercantile book ; nor is the novelty of the thing a sufficient reason to reject it ; it had not been all at once that every thing which makes a part of the law and custom of merchants at this day was established ; it was not without considerable struggles that bills payable to bearer obtained the same privileges as those payable to order : new facts laid the foundation of new rules ; and unless the decision on the question of felony could preclude all further discussion, there could be no inconvenience in its being determined now for the first time, that where a bill was drawn in the name of a fictitious payee and accepted, the drawer and acceptor should, by the custom of merchants, be answerable for the money to a holder by a fair consideration.

THAT such a holder, in substantial justice, ought to recover against either the drawer or the acceptor, there can be no doubt : He has parted with his property on the faith of their security ; and it is not very gracious in them to tell him, that because, by their contrivance perhaps, he has one security less than he supposed, he shall not have the advantage of those which really exist.

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SUCH was the substance of the arguments on both sides of this important cause, and the points proposed for the opinion of the judges were these:

FIRST, Whether the publication of the bill by the defendant with the fictitious indorsement on it, he knowing at the time that it was fictitious, amounted to a felony?

SECONDLY, If that were not a felony, whether the facts found by the special verdict, supported the judgment on the count, which stated the bill as payable to bearer?

THIRDLY, If judgment on that count could not be supported, whether it could be supported by any other count founded on the bill as a specialty?

FOURTHLY, Whether, on any of the other counts which stated all the particular circumstances of the case, the plaintiff was entitled to recover?

It was also suggested by the Lord Chancellor, that if on the first point, the opinion of the judges should be in favour of the defendant in error, and on the others against him, another question might still be considered, whether, when the defendant to the action was privy to the fraud, the plaintiff might not recover in an action of deceit?

ON the first question, with respect to the felony, all the judges who delivered their opinions, agreed that the matter found in the special verdict was sufficient to relieve them from the necessity of pronouncing the drawers or the acceptors guilty of forgery; because as it did not appear on the face of the special verdict,

verdict, the policy of the law would not suffer the judges to infer it.

ON the next question, whether, on the matter found in the special verdict, the bill mentioned in the fifth count could be deemed in law a bill payable to bearer?—six* of their Lordships were of opinion that it might. On the question, whether the verdict could support any other count?—four† were of opinion that it would support the first. Two other judges,‡ together with the Lord Chancellor, were of opinion that the judgment could not be supported on any count.

THE arguments of the four who thought that the judgment might be supported either on the fifth or first count, were nearly similar, and to this effect:

THE bill in question imported to be a Bill of Exchange, payable to John White, or his order, but it never was, and it never could be so, because no such person as John White existed. This was a fact known to the acceptors as well as to the drawers; it might therefore not be too much to say that the intention of the acceptors was, that it should be payable to the bearer; they knew it had no indorsement on it by John White; they knew it came into the hands of Minet and Fector from Livesay, Hargrave, and Co.—It was
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* Hotham, Thompson, Perryn, Barons—Gould, Justice—and Lords Kenyon and Loughborough.

† Hotham, Thompson, Perryn, Gould.

‡ Eyre, Chief Baron,—and Heith, Justice.

sent into the world as a bill payable to bearer. The great principle on which their Lordships went was, that parties to a bill should not, any more than parties to any deed or instrument, take advantage of their own wrongful act. The plaintiffs in error having accepted this bill with the privity that John White was a fictitious payee, and that the holders could not derive a title through him, the law would presume that they intended that ceremony should be waved. That this bill might be paid, the law would conclude that it was the undertaking and intention of the acceptors to pay it to any *bona fide* holder; or, in other words, it should be considered as a bill payable to bearer.

SUCH a construction, they conceived, would be most conformable to the effect which ought to be given to all commercial transactions, to true policy, and the principles of substantial justice. It was not possible for these partners in fraud to say, "We have accepted this bill, but we meant nothing by it, but to cheat all mankind." The law would hold them more strongly to their engagement, on the ground of their own fraud, and would consider the bill as capable of being transferred by delivery. They should not be permitted to say, that the bill was not according to the law and custom of merchants. The acceptors had put themselves in a situation which made it obligatory on them to pay the bill, either in the very terms of it, or according to its legal operation, as in the present case, where the

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name of John White must be looked upon as nothing,—as a non-entity,—and the bill must be considered as payable to a real existing person, that is, to the bearer.

THEY were of opinion that the judgment of the Court of King's Bench would afford a proper security to paper circulation; that it would tend to the support of public credit, and prove most beneficial to the great interests of commerce.

ON this question, therefore, they were of opinion, that on the matter found in the special verdict, the bill, as mentioned in the fifth count, might be considered as a bill payable to bearer.

ON the question, Whether the matter in the special verdict would support any other count in the declaration?—they were of opinion that it would also support the first count, by considering the bill as a new bill, by the subsequent indorsement of Livesay, Hargrave, and Co. Every indorsement was in the nature of a new bill, and had the same effect as if they had originally drawn the bill, without the name of John White, payable to themselves or their own order. The acceptance was subsequent to this indorsement, which must therefore be coupled with the knowledge which the acceptors had, or were bound to have, of this second indorsement by the drawers; in this view they considered the acceptors as liable under the first count.

THE argument of the Chief Baron was to this effect :—That there was not a pretence for saying that the matter of the special verdict

dict could support any of the counts, except the first, second, fifth, and sixth: that therefore the inquiry was reduced to this, whether this special verdict would support any one of these four counts. This included every thing that remained on the second and third questions. The Court of King's Bench, he said, were of opinion, that neither the first, second, nor sixth count, could be supported in point of law; and this would be material on the argument on the second question.

HIS Lordship entered particularly into the distinct natures of the two kinds of bills, and the difference in the manner of transfer, the one being transferable by indorsement, and the other by delivery, which gave rise to the difference in the manner in which the holders of these respective instruments must make out their titles.

It had been contended on the other side, that this was a bill payable to bearer. In his Lordship's apprehension, it was a mere nullity: it was not surely a very sound argument to say, that this must be a bill payable to bearer, because it could be payable to no other man. The assignable quality of a bill was a thing created in the original frame and constitution of the instrument; and the party to whom it was offered had only to read it. If the intent of the parties was to be collected from what appeared on the face of the instrument, they must consider it as a bill to pass by indorsement. Where then was the authority for saying, that it was according to the effect
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and meaning of the bill, that the contents should become payable to the bearer?—Every bill should be taken to be what, on the face of it, it imported to be, and ought not to be governed by any extrinsic circumstances. It had been stated, that there was an analogy between Bills of Exchange and deeds, and that the same sort of construction was applicable to both. But it ought to be observed, that deeds, by the common law, had a certain operation and construction. Bills of Exchange were instruments which derive their effect from the custom of merchants. Yet, admitting that there was some analogy between Bills of Exchange and deeds, would it from thence follow that a bill payable to order, could be construed into a bill payable to bearer?

THERE were certain words in deeds which had a certain sense and known construction, according to their plain, obvious, and common import. If judges went one step beyond this, they did not *construe* men's deeds, but *made* them. It was fallacious to apply the rules of common law to the law of merchants. It had been said, that Bills of Exchange ought to be supported: they certainly should; but if a man would demand payment of a Bill of Exchange according to the law of merchants, he ought to bring his case within that law.

THE plaintiffs had declared on this bill as a Bill of Exchange, and stated their title to it to be by assignment; the custom of merchants directed that this assignment should be by indorsement;

indorsement ; and if the payee were a real person, it could not be transferred in any other manner. If a man claimed to be entitled to a Bill of Exchange drawn in favour of a real payee, and not having an indorsement by that payee, he could not recover on it as a Bill of Exchange, though he had paid a full consideration for it. But, in the present case, it was said, that John White was a fictitious name, and that his indorsement was likewise fictitious ; this fact, it was said, was known to the acceptors ; by reason whereof, and by the custom of merchants, the acceptors became liable to pay the value of the bill to the plaintiffs. He had looked in vain where the places were to be found of this usage and custom of merchants applying to such a case. What logician could draw such a conclusion from such premises ? Where was such a rule to be found ? If no such rule was to be found expressly laid down, was it to be collected by inference ? In his apprehension nothing could warrant such a conclusion.

HE was ready to admit, that by the law of England, no man should be permitted to allege his own crime ; and in that sense he agreed, that no man should take advantage of his own fraud, to set it up by way of defence ; but still a plaintiff must recover by his own strength ; and the plaintiff on a Bill of Exchange, like a plaintiff in every other case, must shew a sufficient title. He must prove his case, and when that was done, it should not be permitted to the defendant to set up his own fraud, to insist that the payee was ficti-

tious, and turn that into a defence in answer to the plaintiff's case ; but here was the fundamental fallacy in the arguments used by the judges on the other side of the question, arising from not observing this proposition—That the plaintiffs must first prove their case and make out their title before the defendants were called upon to say any thing. But here the plaintiffs, in making out their own case, were driven to shew the facts, which the defendants, by way of defence, were attempting to shew against them.—Where the plaintiffs could not make out a fair *bona fide* case, the defendants were not bound to say any thing.

HE considered the interest of commerce to be deeply concerned in the support of fair credit, and the discouragement of false. The interests of commerce, and of gentlemen who dealt in discounting paper money, were not exactly the same. Trade might receive a deep wound from the failure of a number of capital houses, when the dealers in paper might receive twenty shillings in the pound, by proving their debts under twenty different commissions. While their Lordships were attending to the interests of the holders of bills circumstanced like the present, they ought not to forget the interests of the trade and commerce of the country. To support such instruments as this, was to encourage a spirit of loose adventure, a spirit of gaming in commerce, a spirit of fraud of every kind, the weight of which must necessarily cramp
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and depress every honest man, who traded on his own capital. No evil could arise by giving judgment against these bills; but if they were held to be recoverable in a court of law, there would always be found people who would avail themselves of the advantages to be derived from the negotiation of such bills; this fictitious credit would go on, and where the mischief would end no man could tell.

SUCH were the reasons which induced his Lordship to think that the judgment of the Court of King's Bench ought to be reversed.

MR. JUSTICE HEATH concurred with the Chief Baron, and argued in a similar manner.

LORD KENYON observed, that if their Lordships could support this judgment, they would be glad to do it, and make it subservient to the honesty of the case.

IN order to make out a title in a manner conformable to the words of the instrument, the indorsement of John White must be proved; this could not be done in this instance, because the special verdict had found, that no such person existed. From the nature of this bill, it could not be negotiated in the terms in which it was drawn; but melancholy indeed must be the case of many persons, if there were positive rules of law that no instrument should operate at all, unless it operated in the very terms in which it was written. But deeds operated in a variety of ways, in order to effectuate the intentions of the parties. He was surprised at the observation that deeds admitted of a more lax construction

tion than Bills of Exchange. This doctrine was new to him. In deeds that were intended to act on real property, and where the assistance of conveyancers was called in, he should have thought as much strictness at least ought to be observed in the construction of instruments of that sort, as in Bills of Exchange, which were drawn by men of plain common sense, who were engaged in trade, and who had no legal assistance. He saw nothing that could prevent such a bill as this being negotiated according to its legal operation. There was the case of a Bill of Exchange which came extremely near to this, tried before Lord Mansfield in 1769, where his Lordship had held, that the holder was entitled to recover.

IN answer to the observation, that it would be hard if some remedy were not to be given to the party who had paid a valuable consideration for this bill, it had been said that the plaintiffs ought to have brought their action *ex delicto* against the acceptors. But it must be remembered, this was a remedy not negotiable in its nature; it could not be transferred, and died with the party who was guilty of the fraud. An action *ex contractu* did not die with the party entering into the contract. His Lordship saw no reason why the judgment of the King's Bench should not be affirmed.

THE Lord Chancellor began with observing, that this question did not turn on any general rule of substantial justice, or on policy, but on the form of the action; and the question was, whether the plaintiffs' method of complaining,

complaining, and the mode in which they sought redress, did or did not apply to their particular case.

IN the whole course of the argument, no doubt had been entertained of the wisdom of the law, which had ordained specific remedies for specific cases.

BY the special verdict, the plaintiffs were not found to have any cognizance of the fraud; the bill being drawn in the manner in which it was, it became important to say whether there was no fraud. The reason of making the bill payable to the name of John White, was in order to give it a greater degree of currency, and a more extensive circulation. It was to give countenance to a thing which was unreal, and which, in his Lordship's apprehension, must be deemed a fraud.

HIS Lordship, after remarking on the distinction between bills payable to order and payable to bearer, proceeded to observe that the special verdict had stated all the facts necessary to be known, except one, which would have been very material, and that was whether Gibson and Johnson, at the time they accepted this bill, knew that the defendants in error had paid the drawers value for it. In consequence of accepting this bill, the acceptors came under all the obligations to pay it which the nature of the instrument required.

THE thing which first required explanation was this: what was the true construction of the law on this instrument, with respect to all the parties to the transaction? Under what obligations had they come to the public

public or to the individuals concerned in the bill? This was a very material article in the inquiry. The learned judges had confined their answers too closely to the special verdict, and had not given him that satisfaction which he had expected on this part of the case. It had indeed been hinted, that if a forgery had been stated in the special verdict, this might have made a difference; and it had been doubted, whether the acceptance would have been a felony, though the indorsement had been found to be a forgery with respect to the drawers: as on the special verdict, however, no forgery was stated, nothing of this sort could be implied: it was for the safety of mankind that the forms of law should be observed, and that nothing should be assumed beyond what was expressly found by the special verdict. Though the evidence were ever so cogent, a court of law could not draw the conclusion; that was the province of the jury.

THIS was indeed a melancholy case, with respect to the parties. For, whatever became of this bill, with respect to the very next that came before the court, it must be decided, whether this was or was not a forgery: whether the putting the name of John White, or any other forged name on a Bill of Exchange, was not matter within the statute. This he could have wished to have been stated. It must therefore be found. It must be decided, whether those who call themselves merchants shall be permitted to put fictitious names,

names, or the names of any other persons or bills, and write those names themselves.

IT was a question which deserved a solution, how far such an instrument as this was or was not to be considered as made for the purpose of obtaining money under false pretences?

THE criminality of this instrument ought, in his Lordship's opinion, to prevent the holders of it from bringing an action on it. He was rather inclined to go on the fair and clear rules of law, let the loss fall where it would, than to strain a rule of law to do substantial justice in a particular case: for by the latter, more harm was done to the public than good to individuals.

THE next question which arose in this inquiry was, whether this was a bill payable to bearer in the terms of the fifth count? And here his learned friend, who had immediately preceded him, had disappointed him. He thought it material to be determined, at what period this instrument began to be a bill payable to bearer. Did it begin, in the language of the sixth count, after it came into the hands of the holders, and before they carried it to the acceptors?—Suppose the holders of this bill had known that John White was a nominal person at the time they took it,—he wished to know whether, in that case, it would have been a bill payable to bearer. He wished also to know, if this bill had been lost, and had got into the hands of a stranger without any of those names upon it, whether that stranger could have come to the acceptors and demanded payment; could he have recovered

covered in an action against the acceptors, and have put the acceptance out of doors ?

As a measure of general policy, it was of extreme importance that transactions of this kind should be stopped. Fictions on bills would be the constant course, if their Lordships made such bills payable to bearer.

WITH regard to the hardships of the case, he observed there must be some remedy. The law always found a proper remedy for every injury. The question was fairly reduced to this : was it ever according to the avowed policy of the law of England, that the contents of a Bill of Exchange should be proved by any thing but by the words of the bill ? He conceived that no bill could have a sense introduced upon it, but what was agreeable to the words of the bill ; and it was on account of its deviation from this rule that he dissented from the present judgment. If it were said, that a Bill of Exchange was what it purported to be, the holder knew what he had to expect, and would not be afraid of advancing his money ; but if it were held that a bill, which, on the face of it, appeared to be payable to order, was a bill payable to bearer, it was impossible for the holder to know what would happen. The Court of King's Bench had given a judgment on this bill contrary not only to all the notions which the holders had on the subject, but contrary to every expectation which they could possibly entertain when they took it—they had taken

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it as a bill payable to order, and it had turned out to be a bill payable to bearer.

It had been humorously said, that it could not be told what a will was, till it had gone through the House of Lords; but he had never heard this of a bill of exchange.

HIS Lordship next adverted to the *nisi prius* decision of Lord Mansfield, in 1769. He conceived that case did not apply to the present; because Lord Mansfield had said he would not permit parties to avail themselves of their own fraud; and held that the instrument should be considered to be what it purported to be on the face of it. But in the present case directly the contrary was attempted; it was wished to convert a bill which on the face of it purported to be a bill payable to order, into a bill payable to bearer. He conceived that more authority had been given to that case than Lord Mansfield intended.

It had been said, that this judgment might be supported from analogy to deeds which regulated the conveyances of real estates. In deeds, there must be certain words used, as *dedi concessi*, &c. without which the conveyance would be void. There must be a subject grantable; there must be a person capable of granting; and there must be a person capable of receiving.

IN like manner he conceived there must be a certain form of words used in bills payable to order, and a different form in bills payable to bearer. It must appear clearly on

the face of the bill, whether it be a bill payable to order, or a bill payable to bearer. On these grounds he differed in opinion from those who thought the judgment would be maintained on the fifth count.

IF he were to support the judgment on any count it would be on the first. This was not a Bill of Exchange, assignable according to the law and custom of merchants, but it was an undertaking. If the defendants in error had given money to the drawers for this bill, and the acceptors had known that they had done so, and on that account had accepted the bill, he conceived this would have been an undertaking to pay the debt of another : for in that case the drawers would have been indebted to the holders, and the acceptors would have been apprized of that circumstance ; and the consideration would have been, that they, by interposing their credit, would have prevented the holders from going back on the drawers. It would not have been a *nudum pactum*.

BUT his Lordship conceived it would be impossible the judgment could be supported even on the first count, and he saw no ground on which it was possible to affirm the judgment. Their Lordships ought not to forget the numerous inconveniences that would attend the transactions of commercial men.—*Who* was to know that John White was a mere fiction ? *When* was it to be known ?—When the holders come against the acceptors, they refuse payment, and stand an action ; and at last the holders are told that the instru-
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ment which they took as a bill payable to order, was a bill payable to bearer. Let it be fraud or not to make such an instrument, it must be an assignable bill: The acceptors should not be allowed to urge fraud in their own defence: they should be bound by the fraud: they should be tied down to their transaction as if it had been honest and *bona fide*. But the observation of the Chief Baron appeared unanswerable, that until the plaintiffs had made out their title, the defendants could not be called upon to make a defence.

LORD Loughborough said, that he continued of the same opinion which he had originally delivered in the Common Pleas; that this instrument ought to be considered as a bill payable to bearer.

THE Lord Chancellor had very properly proposed to the consideration of the judges, a question preliminary to the discussion on the merits. This question was, whether by the matter found in the special verdict, the acts done by the parties to this bill imported an utterance of it, knowing it to have been forged?

THE answer which had been received was, that from the matter found in the special verdict, it was impossible to say any forgery had been committed respecting the bill. One of the judges had hesitated whether the acceptance amounted to an utterance; but the general opinion was, that there was no forgery on the bill. The ground on which the judges delivered this opinion was incontestable. The special verdict did not state that the writing

ting of the name of John White on the bill was done with an intent to defraud any particular person.

ON the special verdict, the transaction was stated thus—Livesay, Hargrave, and Co. made this paper in the form of a bill, and directed it to Gibson and Johnson, desiring them, three months after date, to pay to John White, or order, 721l. 5s. for value received. After that, and before the bill was presented for acceptance, it got into the hands of Minet and Fector, for a valuable consideration. But a very material circumstance had taken place, by the drawers having indorsed it. The indorsement of the drawers was certainly unnecessary with respect to the bill itself; but the jury seeing the indorsement of the drawers before the value of the bill was actually paid, thought it a demonstration that no deception had been practised on the holders, but that it must have occurred to Minet and Fector, that White was not in fact the payee of the bill; for that if he had, it must have come from him, and not from the drawers; and that it was impossible to account for its coming back again to the drawers, if it had come out of the hands of the payee, which it must have done had he been a real person. This demonstrated that it was completely indifferent whether White existed or not; whether he was worth a sixpence or not; whether he was to be found or not. Gibson and Johnson accepted it as the draft of Livesay, Hargrave, and Co. with their indorsement upon it, as
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the indorsement of a bill that had never been out of their custody. Finding it with the name of Livesay, Hargrave, and Co. indorsed upon it, as well as that of John White, they accepted. On what ground, and under what circumstances did they accept it? Was it an acceptance to pay to the order of John White? They knew at the time the name of White was nothing. They knew it was a bill that had come immediately out of the hands of Livesay, Hargrave, and Co. and therefore they accepted it, to pay to the person who for value held it of the latter, which was to pay it to whoever should be the bearer.

THE distinction between bills payable to order, and bills payable to bearer was this, that the former must be assigned by the real payee; they could never get back to the hands of the drawer but by being dishonoured. A bill payable to bearer was such a bill that any man who picked it up in the streets, might maintain an action on it. The state of the bill in question, when presented for acceptance, negatived the idea that there was any such person as John White. The acceptors knew, that the words *John White*, or order, were merely colourable.

THERE was a convenience in trade for merchants to be able to raise money; and this was frequently done through the medium of Bills of Exchange. The bills were sent to market and negotiated by means of the brokers. The broker put a name upon them, and did not disclose his principal until he had

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found a person who would deal with him ; the principal was then discovered, who then put his name on the bill, and from the moment the buyer got that indorsement, he was perfectly indifferent.

THE acceptance was subsequent to the indorsement by the drawers ; the bill had ceased to be payable to the order of John White, because the acceptors, at the time they put their acceptance to it, took John White to be merely matter of form ; and therefore his Lordship was of opinion, that, in its proper and legal operation, and in the real state of the transaction between the parties, this was a bill which Gibson and Johnson undertook to pay to whoever should produce that bill to them with the indorsement of Livesay, Hargrave, and Co. and to whoever had paid a valuable consideration to the drawers.

THE Chief Baron had conceived the question to be, Whether the plaintiff had made his title to recover on this bill, and that the defendant was not obliged to move one step in the cause until the plaintiff had produced evidence of an assignment made by White, by some circumstances that would amount to a proof against the person who disputed that fact. They must previously establish the fact, that an assignment had been made of that bill by John White, before they could call for payment.

THIS objection had operated strongly on his mind ; but he thought he could answer it : it seemed to him to proceed on a mistaken state of the question.

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HE conceived that the plaintiffs had clearly and distinctly proved their title to the bill, by proving that they had paid value for it to the person from whom they received it.

A FEW observations would make this sufficiently clear. The defendants in error had proved they paid value for the bill to Livesay, Hargrave, and Co. Whether the name of White or order could be proved or not, an action might be brought against them as indorsers. For a long series of years, the courts had held, that in an action by an indorsee against an indorser, it was only necessary to prove the indorser's hand; and it was on this ground that an indorsement made a new bill. In the present bill he could prove that the drawers wrote the name of White with the privity of the acceptors. It was in vain, therefore, to say that he had not made out his title; he had met the difficulty suggested; and the only question was, whether he had made out such a title as would give him a right to recover.

HE confessed, that when the justice of the case stared him fully in the face, he did not find himself pleased to be knocked down by a formal objection. He conceived that substantial justice was of much more importance than the beauties of special pleading.

THIS was an engagement, on the part of the plaintiffs in error, to pay to whoever should hold this bill under the indorsement of Livesay, Hargrave, and Co. Was not this,
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in fact and in truth, an undertaking to the bearer? It was not an engagement to pay expressly to Minet and Fector, but to any person who could entitle himself under an indorsement from Livesay, Hargrave, and Co. The true effect of the bill, in every form in which it could be put, was, that it was a bill payable to bearer. This bill was never sent into the world as a bill payable to order; for while it was in the hands of the drawers it was not; and the moment it was sent into the world, it was a bill payable to bearer. It was no straining of the law, therefore, to say, that this bill, to all intents and purposes, was a bill payable to bearer.

It had been said, that if this judgment were affirmed, it would be productive of numerous inconveniences. He durst not trust himself to look into futurity, to see what would be the consequence of checking this, or the utility of setting up a fictitious payee. If this were really useful to merchants, and was prohibited by the decision in the present case, their Lordships would only tell them, instead of a fictitious name, to substitute the name of the meanest cobbler in the street, or the lowest clerk in the house.

THEIR Lordships knew that the parties had all become bankrupts; suppose the present holders could not recover in an action brought upon this bill, what would be the state of these parties?—At the time when the credit of these different houses was broken up, a vast amount of their engagements stood on such bills, which had been given to tradesmen for goods sold and delivered. The consequence,

sequence might be, that if such bills were held to be a nullity, these gentlemen might finish their bankruptcy; would have their certificates in their pockets, and a large surplus to themselves. It would be a great reproach to justice, and to the laws of England, not to be able to overtake the extravagance of desperate adventurers.

HE was, on these grounds, of opinion, that the judgment of the Court of King's Bench ought to be affirmed.

LORD BATHURST said, that at first he had felt great weight in the objection of the Chief Baron, respecting the insufficiency of the plaintiffs' title, but he was now satisfied that this had always been a bill payable to bearer. But if the cause had been tried before him, he would have followed the example of Lord Mansfield, and not have permitted the defendants to insist on the proof of an assignment by John White, which they had always known was impossible. It was consistent with justice that the holders should recover the amount of the bill for which they had given a valuable consideration; and Gibson and Johnson having accepted this bill, they should not be now permitted to say they would not be bound.—His Lordship therefore thought, that the judgment ought to be affirmed.

THE Lord Chancellor then put the question, that the judgment be reversed, when, without a division, it was affirmed.

SINCE this decision, the question has been again agitated, in the case of Hunter, in the character

character of indorsee, against Gibson and Johnson, in that of acceptors.

THE cause came before Lord Kenyon and a special jury at Guildhall, at the sittings after Michaelmas term, 1791, when the defendants demurred to the evidence offered on the part of the plaintiff.

THE bill was dated "Falmouth, 11th March, 1788," and purported to be drawn by Nathaniel Hingston, payable to *William Fletcher or order*, and was addressed to Gibson and Johnson, Bankers, in London; the acceptance of the latter appeared on the face of it; and it was indorsed "William Fletcher," and "by procuration of Livesay, Hargrave, and Co. A. Goodrich."

THE declaration contained 13 counts:—The first of these stated, in the usual form, the drawing of the bill by Hingston in favour of William Fletcher, and its direction to Gibson and Johnson, suggesting that Hingston, at the time of drawing it, well knew that no such person existed as William Fletcher, mentioned in the bill; it then stated, that on the said bill a certain indorsement was made, purporting to be the indorsement of William Fletcher named in the bill, and to be subscribed with his name, requiring the sum of money mentioned in the bill, to be paid to certain persons using trade and commerce as co-partners, in the co-partnership, name, and firm of Livesay, Hargrave, and Company, *or their order*; that the bill was afterwards presented to Gibson and Johnson for acceptance, who, according

according to the custom of merchants, accepted it, knowing that no such person existed as Wm. Fletcher in the bill named, and that the name of William Fletcher so indorsed on the bill was not the hand-writing of any person of that name; and that the said persons using trade and commerce in the name and firm of Livesay, Hargrave, and Company, afterwards, by a certain indorsement on the bill, subscribed with the hand and name of one Absalom Goodrich, by procuration of Livesay, Hargrave, and Company, according to the custom of merchants, appointed the money, in the bill mentioned, to be paid to the said Robert Hunter, and delivered the bill so indorsed, as well with the name of the said William Fletcher as with the name of the said Absalom Goodrich to the said Robert Hunter, by reason whereof, &c.

THE second count stated, exactly in the common form, the drawing and direction of the bill; the delivery of it to William Fletcher as a real person; the presentment of it to Gibson and Johnson; its acceptance by them; a special indorsement by William Fletcher to Livesay, Hargrave, and Company, or their order; and the indorsement to Hunter, by their procuration by Absalom Goodrich.

THE third count described the bill as drawn by Hingston on Gibson and Johnson, payable to the bearer.

THE fourth count, after stating that the bill was drawn by Hingston on Gibson and Johnson,

Johnson, and made payable to William Fletcher or order, and that it was presented to Gibson and Johnson, and accepted by them, averred, that at the time when it was drawn, or at any time afterwards, there was not any such person as William Fletcher, the supposed payee, but that the same name was merely fictitious, by reason of which it alleged the sum of money mentioned in the bill became payable to the bearer; and it then averred, that the plaintiff, in due form of law, became the bearer and proprietor of it.

THE fifth count described the bill as drawn on Gibson and Johnson by Livesay, Hargrave, and Company, "with the hand and name of the said Absalom Goodrich by procuration of the said Livesay, Hargrave, and Company, thereunto subscribed," and made payable to Robert Hunter, the plaintiff, or order.*

THESE were all the counts framed on the bill itself.

THE sixth count, reciting "that the said Nathaniel Hingston was indebted to the plaintiff Robert Hunter for money had and received for the use of the plaintiff, and for money paid, laid out, and expended by the plaintiff for the use of the said Nathaniel Hingston; and that the last mentioned sum of money,

* This count was evidently framed on the principle that the indorsement by the procuration of Livesay, Hargrave, and Co. was as between them, the acceptors, and a subsequent indorsee, to be considered as a new bill.

money, at the time of making the promise and undertaking thereafter mentioned, was wholly due and owing and unpaid from the said Nathaniel Hingston to the said Robert Hunter," alleged, that the defendants, Gibson and Johnson, in consideration of the premises, and also in consideration that the plaintiff, at their special instance and request, would forbear and give day of payment of the last-mentioned sum until the 14th day of May, 1788,* and would not sue the said N. Hingston for the recovery of that sum at any time before default should be made by the defendants in payment of it, according to their promise and undertaking next thereafter mentioned, undertook and promised to the plaintiff to pay him that sum on the 14th day of May, 1788: It then averred that the plaintiff, confiding in this promise and undertaking, forbore and gave day of payment till the 14th of May, 1788, and did not sue or prosecute the said N. Hingston for the recovery of the said sum, or any part of it, at any time before the defendants had made default in paying the said sum, according to their promise and undertaking; and that the plaintiff had not at any time *since* the making of that promise and undertaking sued or prosecuted the said N. Hingston for the recovery of that sum or any part of it, but had wholly forborne so to do; and that the said last-mentioned sum of money remained wholly due and unpaid, &c.

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* This was the day the bill became due.

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THE seventh count differed from the sixth only in this, that it alleged the undertaking of the defendants to pay on the 14th of May to be conditional, "if the said sum of money should then remain unpaid to the said Robert Hunter;" and, instead of averring "that the said last-mentioned sum of money remained wholly due and unpaid," averred "that, on and after the said 14th day of May, 1788, it had remained, and had been, and still remained, and was wholly due and unpaid, &c."

THE eighth count resembled the sixth, stating Livesay, Hargrave, and Company, as the original debtors to Hunter, instead of Hingston.

THE ninth differed from the eighth only as the seventh did from the sixth.

THE tenth was for money had and received; the eleventh for money paid; the twelfth for money lent and advanced; and the thirteenth on an account stated—The plea was the general issue.

THE record proceeded in these words:—

"AND the jurors of the jury, whereof mention is within made, being called, likewise come, and being chosen, tried and sworn, to say the truth of the premises within contained, the said Robert Hunter produced to the jury aforesaid a certain instrument in writing, in the words and figures following, that is to say—

£. 521. 7s.

£. 521. 7s.

Falmouth, March 11, 1788.

"Two months after date pay to Mr. William Fletcher, or order, five hundred twenty-one pounds seven shillings, value received, with or without advice.

NATHANIEL HINGSTON.

To Messrs. Gibson and Johnson,

Bankers, London.

No. 2068.

G. and J.

AND whereupon are the following indorsements, "William Fletcher," "by procuration of Livesay, Hargrave, and Co." "A. Goodrich;" and the said Robert Hunter, to prove and maintain the issue within joined on his part, shews in evidence to the jury aforesaid, by Robert Booth, a witness duly sworn in that behalf, that he, the said Robert Booth, was a clerk to certain persons using trade and commerce as co-partners, in the co-partnership, name, and firm of Livesay, Hargrave, and Company, and that one Nathaniel Hingston was, at the time of drawing the said instrument, a shop-keeper, at Falmouth, in the county of Cornwall; that the name of Nathaniel Hingston subscribed to the said instrument was the hand-writing of the said Nathaniel Hingston, and that he drew the same as agent to the said Livesay, Hargrave, and Company;

Company; that Livesay, Hargrave, and Company used to send down to the said Nathaniel Hingston blank Bills of Exchange for him to sign as the drawer thereof; that many such blank bills were sent down together; that when they were returned to the said Livesay, Hargrave, and Company, they filled up the blanks with the sum to be paid, and the name of the person to whom the same was to be payable; that when the bills were so drawn and filled up, they were carried, indiscriminately with other bills, to the house of Thomas Gibson and Joseph Johnson, the defendants, for their acceptance; that Livesay, Hargrave, and Company gave Gibson and Johnson advice of the bills so drawn by the said Nathaniel Hingston; that such bills, indiscriminately with the said other bills, used to be carried two or three times a day from the house of Livesay, Hargrave, and Company to the house of Gibson and Johnson for acceptance, and were often carried wet; that the acceptance of the bill produced was the acceptance of the defendants, Thomas Gibson and Joseph Johnson; that the said Robert Booth upon those occasions used to see the defendant Johnson; that Livesay, Hargrave, and Company were generally indebted to the defendants, Gibson and Johnson, on the balance of accounts, for cash advanced by the said Gibson and Johnson to the said Livesay, Hargrave, and Company; that the defendants, Gibson and Johnson, were covered for these acceptances by Bills of Exchange

change given as a security for the same, but that the said bills so given as a security have not been paid; that no such person as William Fletcher in the said instrument and indorsement named, existed; and that the name William Fletcher, so indorsed on the said instrument, was not the hand-writing of any person of the name of William Fletcher. And the said Robert Hunter further shews in evidence to the jury aforesaid, by one Stephen Barber, a witness duly sworn in that behalf, that he negotiated the instrument now produced, with the plaintiff Robert Hunter; that he carried it from Livesay, Hargrave, and Company, to get it discounted for them; and that he told the said Robert Hunter from whom he came: that the said Robert Hunter gave him the value for the said instrument in money, and he took it back to be indorsed by Livesay, Hargrave, and Company; and that it was indorsed by Absalom Goodrich, by procuration of Livesay, Hargrave, and Company: that the said instrument had been accepted by Gibson and Johnson before it was carried to be discounted."

AFTER stating the demurrer to this evidence, and the joinder in demurrer, the record proceeded thus:

"WHEREUPON it is told to the jurors aforesaid, that they shall inquire what damages the said Robert Hunter has sustained, as well by reason of the matter shewn in evidence as aforesaid, as for his costs and charges by him

about his suit in this behalf expended, in case it shall happen that judgment shall be given upon the evidence aforesaid for the said Robert Hunter; and the jurors aforesaid, upon their oaths aforesaid, thereupon say, that if it shall happen that judgment shall be given for the said Robert Hunter upon the evidence aforesaid; then they assess the damages of the said Robert Hunter, by him sustained by reason of the matter shewn in evidence as aforesaid, besides his costs and charges by him about his suit in this behalf expended, to 52*l.* 7*s.* and for those costs and charges to 4*s.*— and thereupon the said jurors, by the assent of the said parties, are discharged from giving any further verdict upon the premises.”— Then followed the entry of judgment for the plaintiff.

IN Hilary term, 1792, this demurrer to evidence was set down for argument before the Court of King's Bench; but it being the understanding of both parties that a writ of error was to be brought, the court gave judgment for the plaintiff, without argument.

ON this judgment a writ of error was brought, returnable in Parliament, and the general errors assigned.

THE case having been fully argued at the bar of the House of Lords, the following questions were proposed to the judges:—

1. WHETHER, upon the state of the evidence given for the plaintiff in this case, it was competent to the defendants to insist upon
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on the jury being discharged from giving a verdict, by demurring to the evidence and obliging the plaintiff to join in demurrer?

2. WHETHER, on this record, *any* judgment can be given?

3. IN case *no* judgment can be given, what ought to be the award?

To these questions Lord Chief Justice Eyre delivered the unanimous answer of the judges.

HIS Lordship, after explaining the nature of demurrers in general, and concluding his explanation by observing, that before the question between the parties could be referred to the decision of the judges, "the *fact* must be first ascertained," proceeded to discuss the first question in the present case.

"ALL the books," he observed, "agreed, that if a matter of *record*, or other matter in *writing*, were offered in evidence to maintain an issue joined between the parties, the adverse party might *insist* on the jury being discharged from giving a verdict, by demurring to the evidence, and *compelling* the party offering the evidence to join in demurrer: that the books also agreed, that if *parol* evidence were offered and the adverse party demurred, he who offered the evidence *might* join in demurrer if he *would*; but that, on the question whether the party offering *parol* evidence should be *compelled* to join in demurrer, the language of the books was very indistinct. That the reason assigned, why he
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should be *obliged* to join in demurrer, when the evidence he offered was in *writing*, was this, "*that there could not be any variance of matter in writing.*"* That *parol* evidence was sometimes *certain*, and no more admitted of any variance than matter in writing; but it was also frequently loose and indeterminate, frequently circumstantial. That the reason for obliging the party offering evidence in writing to join in demurrer, applied to the *first* sort of *parol* evidence, but did not apply to the second, which might be urged with more or less effect to a jury; least of all would it apply to evidence of circumstances which was meant to operate beyond the *proof* of the *existence of those circumstances*, and to conduce to the proof of the existence of *other facts*—yet, if there could be no demurrer in such cases, there would be no consistency in the doctrine of demurrers to evidence, by which the application of the law to the facts on an issue was meant to be withdrawn from a jury, and transferred to the judges. If the party who demurred would *admit the fact*, the *evidence* of which fact was loose and indeterminate; or in the case of *circumstantial* evidence, if he would admit the *existence of the fact*, which the *circumstances* offered in evidence conduced to prove, there would then be no more variance in this *parol* evidence than in a matter in writing, and the reasons for *compelling* the party who offered the

* *Middleton v. Baker*, Cro. El. 753. S. C. 5 Co. 104.

the evidence to join in demurrer would then apply, and the doctrine of demurrers to evidence would be uniform and consistent."

AFTER shewing, from an elaborate examination of the cases* on the subject, that this was the fair result of the principles adopted in them, his Lordship said, that the answer on which the judges had agreed to the first question proposed to them was this, "That upon the state of the evidence given for the plaintiff in this case, it was *not* competent to the defendants to insist upon the jury being discharged from giving a verdict, by demurring to the evidence, and obliging the plaintiff to join in demurrer, *without distinctly admitting upon the record every fact and every conclusion which the evidence given for the plaintiff conduced to prove.*"

TO the second question it was answered, that no judgment could be given; that the examination of the witnesses had been conducted so loosely, or the demurrer had been so negligently framed, that there was no manner of certainty in the state of the facts upon which any judgment could be founded."

TO the third question it was answered, "that a *venire facias de novo* ought to be awarded," which was accordingly done.†

THE

*Baker's case before mentioned, Wright v. Pindar. Al. 18. S. C. Stile 22. Worley v. Filisher, 2 Rolle's Rep. 117.

† Gibson and Johnson v. Hunter, in error, 2 H. Blackstone 187—209.

THE cause came on to be tried a second time before Lord Kenyon, at Guildhall, at the sittings after Trinity term, 1793, when the defendants tendered a bill of exceptions to his Lordship's direction to the jury, the record of which, after stating the bill with the indorsements, proceeded thus :—

“AND the said plaintiff thereupon proved, and gave in evidence to the said jury, that the name Nathaniel Hingston, purporting to be subscribed to the said paper writing so produced to the said jury, was of the proper hand-writing of the said Nathaniel Hingston, and that the said Nathaniel Hingston so subscribed the said paper writing, as the drawer of the same, and as the agent of the said Livesay, Hargrave, and Company, and was accustomed to draw bills of exchange for them, in his own name, as their agent, and that the said Nathaniel Hingston resided at Falmouth; that no such person as William Fletcher the supposed payee ever existed, and that the name *William Fletcher* was merely fictitious; and that the said paper writing, so subscribed by the said Nathaniel Hingston, and before the same was indorsed with the name of “A. Goodrich, by procuration of Livesay, Hargrave, and Co.” and also before the letters and figures No. 2068, and the letters G. and J. were subscribed thereto, was sent by the said Livesay, Hargrave, and Company, being the same persons mentioned and described in the said indorsement, by the name or firm of Livesay, Hargrave, and Co. to the said defend-
ants.

ants for acceptance, who accordingly accepted the same, by subscribing thereto the said letters and figures, No. 2068, and also the said letters G. and J. as the initials of their respective names. That the indorsement of the name of *William Fletcher*, was made by a clerk of Livesay, Hargrave and Company, whose name was not William Fletcher, and that the said bill was afterwards indorsed with the words, "by procuration of Livesay, Hargrave and Co. A. Goodrich," by the said A. Goodrich, a clerk of the said Livesay, Hargrave, and Co. and paid and delivered by them to the said plaintiff for a valuable consideration then paid to them by the said plaintiff, who did not know that the payee named in the said paper writing was fictitious. And the said plaintiff, in further maintenance of the said issue so joined as aforesaid, on his part, and to shew that the said defendants, at the time of their said acceptance of the said paper writing, either knew that the said name *William Fletcher*, contained in the same paper-writing, and indorsed thereon as aforesaid, was a fictitious name, or that the said defendants had given authority to the said Livesay, Hargrave, and Co. to draw the said paper writing, so produced to the jury, upon them the said defendants, by and in the name of the said Nathaniel Hingston their said agent, expressed therein to be made payable to the order of a person who did not in fact exist, and whose name was a fictitious name, by having given a general authority to the said Livesay, Hargrave, and Co. to draw Bills of Exchange upon them the said defendants, by and in the name of the said Nathaniel

thaniel Hingston their said agent expressed therein, to be made payable to the order of persons who did not in fact exist, and whose names were fictitious names, did further prove and give in evidence to the said jury, that the said Livesay, Hargrave, and Co. used to send down to the said Nathaniel Hingston, at Falmouth, printed forms of Bills of Exchange, upon paper duly stamped for that purpose, with blanks therein for the dates, the times of payment, the names of the payees, and the sums to be made payable therein, to be signed by him the said Nathaniel Hingston, who used to return the same signed by him the said Nathaniel Hingston accordingly, to the said Livesay, Hargrave, and Co. who then filled up the bills so returned according to their convenience, with dates, the times they were made payable, the payees' names, the greater part of which were fictitious, and the residue real, and the sums for which they were to become payable, and that this was done as the exigencies of the house of Livesay, Hargrave, and Co. required. That when the bills were thus filled up, they were taken to the defendants for acceptance; some of the said bills, when so taken for acceptance, being undorsed, and others of such bills, at the time they were so taken for acceptance, having the names of the supposed payees in such bills indorsed in various hand-writings. That this happened in a great variety of instances, and to the amount of 20,000l. That the said bill or paper writing produced in evidence, although

though dated at Falmouth, was not in fact filled up with the date, the time of payment, the name of the payee, or the sum of money therein mentioned, at Falmouth, but in London. That bills so drawn by the said Nathaniel Hingston, and dated from the same place, were frequently carried at several different times on the same day, by the said Livesay, Hargrave, and Co. to the defendants for acceptance, and accepted by them accordingly. That it requires three days to transmit a bill from Falmouth to London by the post. That in several instances, such bills drawn by the said Nathaniel Hingston, as from Falmouth, have been presented by the said Livesay, Hargrave, and Co. on the second day after the date of them, to the defendants for acceptance, and that they have accepted them without objection. That in many instances, bills so drawn by the said Nathaniel Hingston, were presented by the said Livesay, Hargrave, and Co. to the defendants for acceptance, on the days on which, by the course of the post, the same bills would have arrived, if sent on the respective days of their respective dates, but before the hours of the post's arrival on those days, and that they were accepted by the defendants without objection. That in some instances, such bills were carried for acceptance after the arrival of the post from Falmouth, and other bills of the like kind at different times afterwards on the same day. That in many instances, such bills were carried for acceptance on the day on which they were

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filled

filled up by the said Livesay, Hargrave, and Co. the instant they were filled up, and, whilst the ink with which they were so filled up has been wet. That the house of the said Livesay, Hargrave, and Co. where the said bills were so filled up, was not three minutes walk from the defendants' house. That this was the general course of dealing between the said Livesay, Hargrave, and Co. and the defendants. That the ink has been apparently so wet at many times when the bills were so delivered for acceptance, that the person who delivered them was careful in carrying them that they might not be smeared. That at the time of carrying them in this manner, it was apparent that the signature of Nathaniel Hingston was dry, and an old writing, and that what had been written to fill up the bills was fresh and wet. That the witnesses, by whose testimony the plaintiff gave the said evidence of the several instances of the manner of presenting and accepting the said bills, had no particular memory to distinguish the bill or paper writing produced in evidence from the rest of the bills presented, and accepted by the defendants. That the date of the said bill or paper produced in evidence, the name of the payee, and the sum therein expressed to be made payable, were filled up by a clerk in the house of Livesay, Hargrave, and Co. in London, and that was a general course before described with respect to the other bills that were carried to the defendants wet for acceptance. That the defendants paid bills under

der these circumstances to a large amount, and for a considerable length of time."

THE record then stated the objection by the defendants' counsel to the admissibility of this evidence; the direction of the judge to the jury that it was proper evidence to maintain the issue on the third count, which considered the bill as payable to the bearer: the verdict of the jury according to that direction; the tender of a bill of exceptions to his Lordship; and his Lordship's putting his seal to the latter.

IN Michaelmas term, 1793, the Court of King's Bench gave judgment for the plaintiff, on which the defendants brought a writ of error in Parliament, and assigned the common errors.

AFTER argument at the bar of the House of Lords, the following question was proposed to the judges:—

"WHETHER the circumstances mentioned in the bill of exceptions was sufficiently relative to the propositions therein also mentioned, viz. that the defendants in the action knew the name Fletcher was fictitious, or that the defendants had given authority to Livesay and Company to draw bills upon them the said defendants, payable to fictitious payees, so that they ought to have been received, and left to the jury as evidence thereof?"

ON this question there was a division among the judges, who, in Easter term, 1794, delivered their respective opinions *seriatim* ;
but

but the majority of them, together with the Lord Chancellor and Lord Kenyon, having declared that they thought the evidence ought to have been received and left to the jury, the judgment was affirmed.*

It may be observed, that the *only* question made in this case, was, whether the evidence stated was sufficient for the jury to conclude that the defendants knew that in the particular instance of this bill, the payee was fictitious? or that they had given a *general* authority to Livesay and Co. to draw such bills upon them? If either of these conclusions could be drawn from the evidence, it seems to have been admitted without dispute, that the evidence was sufficient to maintain the action on the bill, as a bill *payable to the bearer*. It follows from hence, That,

IN all cases, where the holder of such a bill declares against the acceptor, as on a bill *payable to the bearer*, it is sufficient to maintain the action, that he should prove; 1. That the payee was fictitious, and, 2. That the defendant knew this at the time when he accepted the bill:—or, 1. That the payee was fictitious, and, 2. That the defendant had given a *general* authority to the drawer, &c. to draw bills upon him in the name of fictitious payees.

IN an action by an indorsee against an indorser, it is not necessary to prove either the
hand

1 Ld.
Raym. 174.
Str. 444.
2 Bur. 675.

* Gibson v. Hunter, in error. 2 H. Blackstone 288—198.

hand of the drawer or of the acceptor, or of any indorser before him against whom the action is brought; for by his indorsement, he virtually undertakes to every subsequent holder, that the names of the drawer, acceptor, and previous indorsers, are really in the hand-writing of those to whom they respectively purport to belong.

THE same diligence also, with respect to the drawee, and the same notice to the defendant as indorsee, must be proved in this action, as in that against the drawer, every indorser being, with respect to subsequent indorsees or holders, a new drawer. But proof of a demand from the drawer, and notice of non-payment by him, is not necessary.

WHERE the action is by an indorser who has paid the money, proof must be given of the payment. Ld. Raym. 743.

IN an action by the drawer against the acceptor, it is necessary to prove the hand-writing of the latter; demand of payment from him, and refusal; the return of the bill, and payment by the plaintiff; but it does not appear necessary to prove, that the acceptor had in his hands effects of the drawer; his acceptance is presumption that he had, and if he had not, the proof must lie upon himself. Vid. Louviere v. Lau-bray. 10. Mod. 36, 37. Symonds v. Parminster. 1 Wils. 185.

IN an action on the case by the acceptor against the drawer, the plaintiff must prove the hand-writing of the defendant, and payment of the money by himself, or something equivalent to that, such as his being in prison in execution. Vid. 3. Wils. 18.

IT does not seem clear, whether in the case of a simple acceptance, the acceptor in this action must not be put to the proof that he had no effects of the drawer in his hands, either at the time of the acceptance, or at the payment of the bill ; but the presumption of law, being that he had effects, it would therefore seem that the proof of the contrary lies on him.

IN the case however of an acceptance or payment under protest, there can be no doubt, but the protest is sufficient presumptive evidence of no effects at the time when the protest was made ; if therefore it was made on payment, it is certainly presumptive evidence of no effects, and it lies on the drawer to shew the contrary : but if the protest was only at the time of acceptance, it is natural to presume that at the time of payment the acceptor had effects, and the proof that he had not must lie on him.

12 Mod. 345.
Gillb. L. E.
118.

IN actions against the drawer or indorser, the protest is sufficient evidence that the bill is not paid ; and the mere production of the protest is sufficient ; it is not necessary to prove either the writing of the notary or to give any account how the plaintiff had the protest ; for that would be destructive to public commerce, and throw too great a difficulty on transactions of this kind : and beyond seas, it is said, that it is sufficient to shew the court the protest without producing the bill itself, but here in general the bill itself must be shewn, as well as the protest, because the whole

G. L. E. 119.

whole declaration must be proved, which cannot be without giving the bill in evidence.

BUT in an action against the drawer of a bill which was lost, it was held by Holt, C. J. that proof of the defendant's having owned that he had made the bill was sufficient. Hart v. King. 12 Mod. 309.

WITH respect to a Promissory Note, the same rules, of what is necessary to be proved, apply, as in a Bill of Exchange; the maker being in the place of the acceptor; the payee, after indorsement, in that of the drawer; and the indorsers and indorsee the same in each.

IN general, direct proof is required of the signature of those parties whose indorsement must be proved: But with respect to the party himself against whom the action is brought, proof of other circumstances may be sufficient to supply the place of actual proof of his signature; particularly, confession. Thus, where the defendant was sued as indorser of a note, and it was proved, that a person to whom application had been made to discount it, sent it to the defendant, who looked on it, and said it was his hand, and that the note, which had some months to run, would be paid when due; the Chief Justice would not permit the defendant to shew forgery, by similitude of hands, because that would tend to destroy all negotiation of Bills and Notes. But he seemed inclined to have admitted actual proof of forgery, if the defendant could have given it, but this he was unable to do, and the plaintiff had a verdict.

Ld. Hard-
wicke.
Cooper v.
Le Blanc.
2 Str. 1051.

So,

**Bevis v.
Lindsell.
B. R.
2 Str. 1149.**

the defendant's hand : This was determined so long ago as the 14th Geo. II. in a case in the King's Bench, where the plaintiff having offered *collateral* evidence to prove the defendant's hand, the court not only held that this was sufficient, but said, that the note being set out in the declaration, was admitted by the default, and that the only use of producing it was, to see whether any money was indorsed on it as paid.

**Batters v.
Bowles.
18 G. 2.
Barnes 233.**

NOTWITHSTANDING this, about four years afterwards the court of Common Pleas gave a different decision, holding not only that the note ought to have been produced, but both the note and indorsement proved.

**Ellis v.
Wall.
Id. 234.**

AND they gave the same decision in a case which occurred soon after.

**2 Bl. Rep.
748.**

**Snowden v.
Thomas.
21 G. 3.**

LONG subsequent to this, the same court is, in one book, reported to have given a similar opinion on the authority of the two last cases.

IT appeared that the declaration contained two counts, one on a note of hand, and another for money expended; the defendant pleaded a set-off; the plaintiff replied, and denied the set-off, and for want of a rejoinder, signed judgment : The note was produced on the execution of the writ of inquiry, but not proved ; and the defendant offered to confess damages on being allowed a month's time to pay the debt and costs ; this was not granted, but the jury found the value of the note.

THIS case coming before the court, Lord Chief Justice De Grey is reported to have expressed himself thus : Damages must either be

be proved or admitted. The present case does neither; for the set-off confesses only general damages on both counts. The note therefore ought to have been proved. But the confession of the defendant's attorney makes this case particular in its circumstances, and on that ground only I am for discharging the rule for setting aside the inquiry. The rest of the court agreed.

BUT in another report of the same case, ^{3 Will. 154} the opinion of the court is represented in very different terms; it is said they were of opinion the jury had done right; the plea of set-off amounted to an acknowledgment of a debt, and the clerk to the defendant's attorney had offered, in the hearing of the jury, to confess damages. And *Gould* added, on a judgment by default in an action on a Promissory Note, or a Bill of Exchange, the sum due on it is admitted, and needs not to be proved on the execution of a writ of inquiry.

BUT this point is clearly decided by a late case in the King's Bench. It was an action ^{3 Term Rep. P. 29. G. 3. Green v. Hearne.} against the acceptor; he suffered judgment by default, the plaintiff *produced* a bill in the same terms as that stated in the declaration; but it did not appear to have been accepted; and no other evidence was produced. It having been objected that the bill produced did not correspond with that mentioned in the declaration, the court observed that it might have been accepted, though not in writing; and that, by suffering judgment to go by default, the defendant had admitted the cause of action.

action to the amount of the bill, because that was set out on the record, and the only reason for producing it to the jury on executing the writ of inquiry, was to see whether or not any part of it had been paid.

Morris v.
Lyne.
B. R. H.
26 G. 3.
Bayley's
App. No. 7.

AND in a case before this, it had been held that it was not even necessary to *produce* the note or bill; for that if the defendant had paid part of it, he might have pleaded that, but he had let judgment go for the whole.

Ruled
anon.
B. R. H.
26 G. 3.
Bailey 67.
Rashleigh v.
Salmon.

AND now, on such judgment, a writ of inquiry is not necessary, for the court on application by the plaintiff will, if no good reason shewn to the contrary, refer it to the proper officer to ascertain the damages and costs, and calculate the interest.

C. B. T. 29
G. 3. Bl.
Term Rep.
252.

BESIDE the different subjects of defence which may be collected from the general principles laid down in the preceding chapters, the most usual are those which arise either from the total want of consideration, or from the illegality of the consideration for which the bill or note was given.

THE want of consideration, it is evident, will be a sufficient defence to an action by one party against another, from whom he has immediately received the instrument; for according to the general principles of law, no contract can be supported without a consideration, and accordingly it frequently occurs, that the defendant rests his case on the circumstance of the bill or note having been given merely for accommodation.

BUT where the plaintiff has in fact given a consideration to the person from whom he immediately

immediately received the instrument, any preceding party being sued on it, cannot protect himself, by saying that he himself had no value of the party to whom he gave it; for by making himself a party to the instrument, he contributed to its currency, and that circumstance was, perhaps, one reason that prevailed on the plaintiff to part with his money: And that in this respect there is no difference, whether the person who actually gave a good consideration, knew that the instrument was actually given without one or not, appears evident from the cases which have been cited on a former occasion.

Vid. Pillant
v. Van
Mierop,
3 Bur. 1663;
Russell v.
Langstaffe.
Doug. 514.

WHERE a consideration is illegal, that as between the parties to the transaction, is a sufficient reason to preclude the plaintiff from recovering, and it is immaterial, whether the illegal consideration be, by the plaintiff himself made the foundation of his suit, or set up by way of answer by the defendant; and therefore the defendant may shew that the note or bill on which he is sued, was given by him to the plaintiff for an illegal consideration.

Guichard v.
Roberts.
1 Bl. Rep.
445. Vid.
Biggs v.
Lawrence.
3 Term
Rep. 454.

WHERE the original transaction however is not morally bad, its illegality arising only from its being prohibited by a positive statute, every thing done in consequence of the prohibited act, will not, of *course*, be considered as void: Thus where two partners enter into illegal contracts with third persons, and on a loss falling on the partnership, one of the partners takes upon himself to pay the whole loss, he cannot recover against the other his proportion of it. But if the other give him

an express authority, or do any act which amounts to an express authority, or even to a subsequent assent to pay his proportion of the loss; this will be binding on him.

Vi1. St. 7
G. 2. c. 8.

Falkney v.
Reynous.

4 Bur. 2069.
1 Bl. Rep.
638.

THUS, where one of two partners, concerned in a stock-jobbing transaction, paid the sum of 3000l. the amount of the loss they had sustained, and the other gave him a bond conditioned for the payment of half that sum, it was held that the obligee should recover on this bond, because it was a debt of honour which the obligor was in conscience bound to pay, and this bond was not within the statute, though one from the losers to the winners would have been so.

Petrie. v.
Hannay.
3 Term
Rep. 418.

THE same principle prevailed, and the authority of this case was recognized in another which occurred very lately. *Keeble* and *Hannay*, with two other persons, had engaged together in illegal speculations in the stocks, and having incurred considerable losses, on the 8th of January, 1774, came to a settlement with *Portis* their broker, who had paid all the differences. On that occasion *Keeble* repaid to *Portis* the whole sum advanced by him, except 811l. which was part of *Hannay's* share of the loss, and for which *Keeble* drew a bill on *Hannay* in favour of *Portis*, which *Hannay* accepted. This bill not being paid by *Hannay* when due, *Portis* brought an action on it against the executors of *Keeble*, and recovered the amount, no defence being set up on account of the illegality of the transaction. *Keeble's* executors afterwards brought

brought an action against Hannay, to reimburse themselves the sum recovered against them by Portis, the declaration being for money paid by the plaintiffs to the defendant's use, on which they obtained a verdict, and the matter being agitated in court on a rule to set aside the verdict, that rule was discharged. *Kenyon, C. J. tamen dubitante.*

WHEN the legality of a transaction is impeached, on account of its being in contravention of a positive law of this country, there is a material distinction between the case, where both plaintiff and defendant reside in this country, and that where the plaintiff resides abroad. In the latter case, though the plaintiff knew that the defendant intended to transgress the laws of this country, yet if the contract be complete, before these laws can attach, he shall recover on that contract.—

Thus, where the plaintiff who resided in Dunkirk, together with his partner, who was a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into England; but had no concern in the smuggling scheme itself, having sold the tea to the defendant in the common and ordinary course of trade, with an intention of being paid in ready money, or in bills drawn personally on him in this country; here it was held that the interest of the vendor being totally at an end, and his contract complete by the delivery of the goods at Dunkirk, the plaintiff had been guilty of no viola-

Holman v.
Johnson.
Cowp. 341.

tion

tion of the laws of this country, of which he was not bound to take notice, and therefore he had a right to recover. If indeed the plaintiff had engaged in the risk of smuggling the goods into England, he would then have been privy to the guilt of the defendant, and would not have been assisted by the laws of that country, whose laws he had contributed to elude.

Higgs v. Lawrence.
Term
Rep. 454.

BUT where the plaintiffs or some of them reside in a place subject to the crown of Great-Britain, and those of them so residing assist in the execution of the smuggling scheme, the others, though in fact unacquainted with the transaction, shall be considered as affected by the knowledge of their partners, and shall not be assisted by the courts in this country.

Vid. Powell in Contracts
Vol. 1 152
o 234.

WHAT is or is not a good consideration it is not intended here to inquire, any farther than, as it is necessary to point out a material distinction which the legislature has thought proper to establish, with respect to the effect which the illegality shall have, in general, and in some particular cases.

Vid. Doug.
30. (614)

IN general no advantage can be taken of the illegality of the consideration, but as between the persons immediately concerned in the transaction; any subsequent holder of the bill or note, by a fair consideration, cannot be affected by it.

BUT there are cases, in which it has been determined, that by the construction of certain statutes, the innocent indorsee shall not recover against the acceptor of the bill, or drawer of the note.

By

By st. 9 Ann. c. 14. s. 1. " All notes, bills, &c. where the whole or any part of the consideration, shall be for any money or other valuable thing whatsoever, won by gaming or playing at cards, dice, tables, tennis, bowls, or *other game or games whatsoever*, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for reimbursing or re-paying any money knowingly lent or advanced for such gaming or betting, or lent and advanced at the time or place of such play to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate, and of no effect, to all intents and purposes whatsoever."

AFTER this statute, there occurred a case in which it appeared, that the defendant had given to one Church, certain Promissory Notes for money knowingly advanced by him to game with at dice; that Church indorsed them to the plaintiff for a valuable consideration, who had no notice that any part of the money for which the notes were given had been lent for the purpose of gaming. After two arguments, the court were of opinion, that the true construction of the words, " shall be utterly void, &c." was, that no recovery could be had against the defendant on the note, even in the hands of an innocent indorsee.

Bowyer v.
Bampton.
Str. 1155.

By st. 12 Ann. st. 2. c. 16. s. 1. " All bonds, contracts, and *assurances whatsoever*,

A a 2

made

made for payment of any principal, or money to be lent, or covenanted to be performed upon or for any usury, whereupon or whereby there shall be reserved or taken above the rate of five pounds in the hundred, shall be utterly *void*."

109 v.
Waller.
Doug. 736.

ON this statute, and on the authority of the case on the statute of gaming, it has been determined that no action can be maintained by an innocent indorsee, against the acceptor of a bill given on an usurious consideration.—The court were of opinion that the words of the statute were too strong not to extend to this case, the word *assurances* being a general term, comprehending all kinds of *securities*, notes and bills as well as bonds, and that the former case stood directly in the way.

By st. 5. G. 2. c. 30. s. 11. "Every bond, bill, note, contract or agreement, or other security whatsoever, made or given by any bankrupt, or by any other person, unto or to the use of or in trust for any creditor or creditors, or for the security of the payment of any debt or sum of money due from such bankrupt at the time of his becoming bankrupt, or any part thereof, between the time of his becoming bankrupt, and such bankrupt's discharge, as a *consideration*, or to the intent to persuade him, her, or them, to consent to or sign any such allowance or certificate, shall be wholly *void*, and of no effect; and the monies thereby secured or agreed to to be paid, shall not be recovered or recoverable;

able; and the party sued on such bond, bill, note, contract, or agreement, shall and may plead the general issue, and give this act and the special matter in evidence."

THERE can be no doubt, from a comparison of the words of this statute with those of the two preceding ones, that the same determination would be given against an innocent indorsee in this case as in the two former: But in none of the cases is he altogether without remedy, for he may sue the indorser on his indorsement, because as between them it is a new bill, and no inquiry can be made into the original consideration.

Str. 2155.
Doug. 744.

It has been observed that except in the particular cases above-mentioned; the defence-raising from the illegality of the consideration, cannot be set up against any other plaintiff than the person who was privy to the original transaction: But this rule must be confined to the ordinary case of a bill or note, indorsed before it was due; for it has been repeatedly ruled at Guildhall, that wherever it appears that a bill or note has been indorsed over, some time after it is due, which is out of the usual course of trade, that circumstance alone throws such a suspicion on it, that the indorsee must take it on the credit of the indorser, and must stand in the situation of the person to whom it was payable.

D. per Buller J. at Launceston Spring Assizes 1788.

THEREFORE in an action by the indorsee of a Promissory Note payable on demand, against the maker; the defendant was admitted to give evidence that the note had been indorsed

Banks v. Colwell, at Launceston Spring Assizes, 1788, before Buller J. cited 3 Term Rep. 81.

indorsed to the plaintiff a year and a half afterwards; and to impeach the consideration by shewing that it had originally been given for smuggled goods, and that payments had been made upon it at several times. And though no privity was brought home to the plaintiff, Mr. Justice Buller nonsuited the plaintiff.

BUT the generality of this rule was doubted by Lord Kenyon, though the other three judges adopted it in its extent. It is however generally agreed that it shall prevail, whenever it appears on the face of the note or bill, that it has been dishonoured, or if knowledge can be brought home to the indorsee that it had been so.

Brown v.
Davis.
3 Term
Rep. 80.

THEREFORE in an action by the indorsee of a Promissory Note against the maker, where the note appeared to have been noted for non-payment, and indorsed after it became due, the defendant shall be admitted to shew that the note was paid as between him and the original payee from whom the plaintiff received it.

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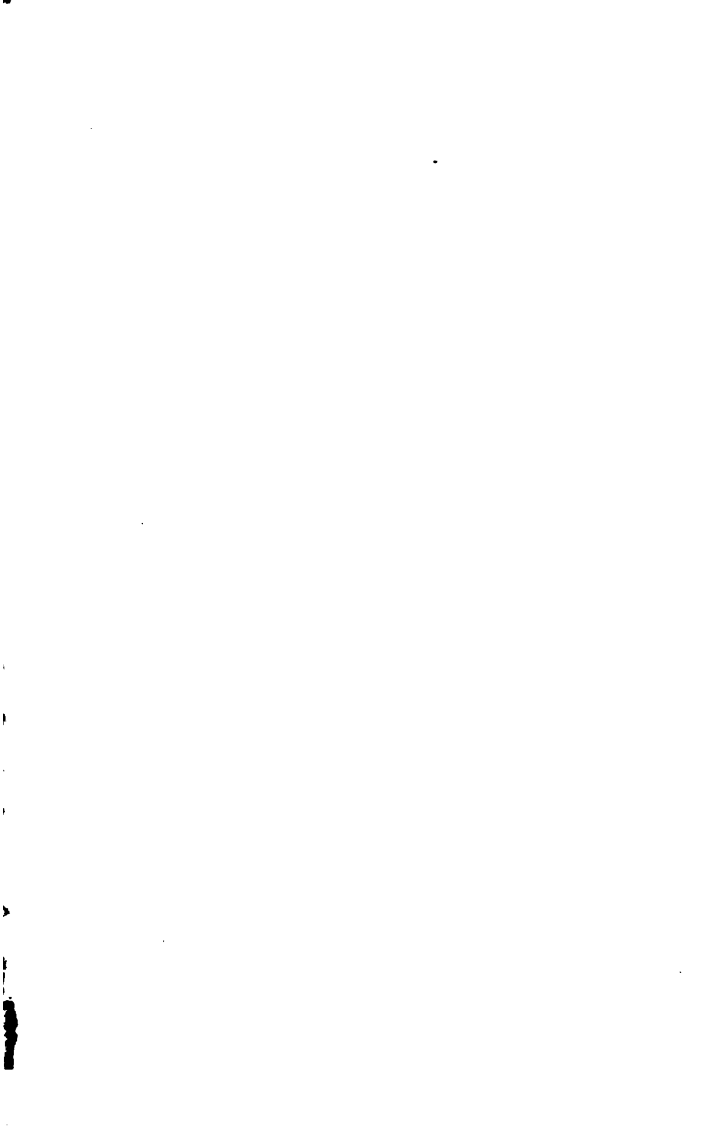
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